85-1749

Supreme Court, U.S.
FILED
NOV 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

in the

Supreme Court

of the

United States

October Term, 1984

JOHN HARTSEL and
PATRICK MURRAY (a/k/a JAMES MURPHEY),
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

Louis Vernell, Jr.
160 Sunny Isles Boulevard
North Miami Beach, Florida 33160
(305) 949-6151 and
Law Offices James G. Roth
420 Lincoln Road
Miami Beach, Florida 33139
(305) 538-0001

Attorneys for Petitioners
John Hartsel and
Patrick Murray a/k/a James Murphey

TABLE OF CONTENTS
FOR APPENDIX TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF JOHN HARTSEL AND PATRICK MURRAY a/k/a JAMES MURPHEY

Item	Appendix Page
Consolidated decision of U.S. Court of Appeals, Fifth Circuit, dated June 29, 1984, in: *U.S. v. Gary Merritt* and *Cori DesRoches*, Case No., 82-3689 and *U.S. v. Charles McGill, John Hartsel, Patrick Murray a/k/a James Murphey* and *Arthur DesRoche*, Case No. 82-3736;	A-1 to A-18
Petition for rehearing for Charles McGill, dated July, 1984, filed on July 12, 1984, in *U.S. v. Charles McGill*, U.S. Court of Appeals, Fifth Circuit Case No. 82-3736	A-19 to A-27
Letter dated July 30, 1984, from the U.S. Court of Appeals, Fifth Circuit re the above cases setting forth status of cases	A-28 to A-29
Order denying rehearing, filed August 30, 1984, of the U.S. Court of Appeals, Fifth Circuit in: *U.S. v. Charles McGill, John Hartsel, Patrick Murray a/k/a James Murphey* and *Arthur DesRoche*, Case No. 82-3736;	A-30 to A-31

Item	Appendix Page
Letter of Transmittal, dated September 11, 1984, from the U.S. Court of Appeals, Fifth Circuit in: *U.S. v. Charles McGill*, Case No. 82-3736; transmitting the above August 30, 1985, Order denying rehearing;	A-32 to A-33
Order filed October 1, 1984, of the U.S. Court of Appeals, Fifth Circuit in: *U.S. v. Charles McGill, John Hartsel, Patrick Murray a/k/a James Murphey* and *Arthur DesRoche*, Case No. 82-3736, denying recall of mandate as to: Charles McGill, Arthur DesRoches and Patrick Murray;	A-34 to A-35
OTHER APPENDED MATTERS:	
Joint "Motion to Supress and Incorporated Memorandum of Law," on behalf of James Murphy and John Hartsell, filed in the U.S. District Court, Eastern District of Louisiana, in *U.S. v. James Murphy, John Hartsell et al.*, Defendants, Criminal Docket 81-400	A-36 to A-63

Item	Appendix Page
Joint "Supplemental Memorandum in Support of Motion(s) to Suppress of Defendants Murphy, Hartsell and Merrit" filed in the U.S. District Court, Eastern District of Louisiana, in *U.S. v. James Murphy, John Hartsell et al.*, Defendants, Criminal Docket 81-400	A-64 to A-83
"Motion and Renewed Motion for Judgment of Acquital or, in the Alternative, Motion for New Trial filed in the U.S. District Court, Eastern District of Louisiana, in *U.S. v. Gary Merritt, et al.*, Defendants, Criminal Docket 81-400	A-84 to A-102
Certificate of Service	A-103

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3689

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

GARY MERRITT AND CORI DESROCHES,

Defendants-Appellees.

No. 82-3736

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES MCGILL, JOHN HARTSEL,
PATRICK MURRAY a/k/a JAMES MURPHEY
and ARTHUR DESROCHES,

Defendants-Appellants,

**Appeals from the United States District Court
for the Eastern District of Louisiana**

(June 29, 1984)

Before TATE, JOLLY, and DAVIS, Circuit Judges.
DAVIS, Circuit Judge:

Charles McGill, John Hartsel, Patrick Murray a/k/a James Murphey, and Arthur DesRoches appeal their

convictions on drug trafficking charges.[1] The United States appeals the judgments of acquittal granted by the district court to Cori DesRoches and Gary Merritt following a jury verdict of guilty as charged on all counts. The government's appeal was argued separately; however, the appeals are consolidated for the purposes of this opinion. We affirm the convictions of Charles McGill, John Hartsel, Patrick Murray, and Arthur DesRoches as well as the judgments of acquittal granted Cori DesRoches and Gary Merritt.

I.

On November 2, 1983, United States Customs officials advised Louisiana State Police officers that they had received an unverified tip that an attempt would be made to import a large volume of marijuana into eastern Louisiana. After receiving this information, state police began a systematic surveillance of suspected marijuana smugglers and sites believed to be used to unload and store marijuana. They also checked motel parking lots in the Slidell, Louisiana area for vehicles and vessels that might be used in a smuggling operation. On the morning of November 3, 1983, investigators discovered a Jeep pick-up truck and a Robalo speed boat from Florida parked at the Ramada Inn in Slidell. Further investigation revealed that the truck and boat belonged

[1]All defendants were convicted of two substantive counts: possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1) (Supp. VIII 1982), 18 U.S.C. § 2 (1976) (aiding and abetting) and importation of marijuana, 21 U.S.C. § 952 (1976), 18 U.S.C. § 2 (1976) (aiding and abetting); and two conspiracy counts: conspiracy to possess with intent to distribute marijuana, 21 U.S.C. § 846 (1976) and conspiracy to import marijuana, 21 U.S.C. § 963 (1976).

to Richard Merrill, a suspected smuggler who was a guest at the motel. Officers placed the truck and boat under surveillance. Later that afternoon Charles McGill pulled the boat to a launch at Fort Pike where he met Merrill. Merrill and McGill took circuitous routes to reach their Fort Pike destination, in fact they drove past the boat launch several times. They launched their speed boat just before dark and waited for darkness to fall before leaving the dock. Under cover of darkness and without showing any running lights, Merrill and McGill were observed navigating the Robalo into the Rigolets, a pass which connects Lake Ponchartrain and Lake Borgne. Lake Borgne opens into the Mississippi Sound which is part of the Gulf of Mexico. Police lost sight of the boat and its occupants after it left the dock. At approximately 11:30 p.m. the officers requested that the St. Tammany Parish Sheriff's patrol boat enter Lake Ponchartrain and look for the Robalo. At approximately 11:35 p.m., however, the Robalo returned to the Fort Pike launch.

As McGill and Merrill were loading the Robalo on their trailer, agents at Fort Pike overheard McGill or Merrill state: "Don't know why they're so mad, we did the best we could with what we had," which officers interpreted as evidence that the Robalo had met with another vessel. Merrill and McGill were followed back to the Ramada Inn in Slidell where officers maintained a surveillance. The sheriff's patrol boat was ordered to look for a larger "mother" vessel on Lake Ponchartrain.

At approximately 11:40 p.m. the patrol boat spotted the M/V FORTY, a 55-foot wooden hull vessel with the configuration of a vessel used to transport work crews in the offshore oilfield. The officers pulled alongside

the vessel, instructed the vessel to stop, and asked the crew to identify themselves and state their business. Captain Arthur DesRoches advised officers that he and his crew, Gary Merritt and Cori DesRoches, were from Miami, Florida and the men were diving for treasure off the coast of Mandeville, Louisiana. The officers did not believe this unusual reason for being in the area, they also noted that the vessel reeked of pine oil — a substance often used by smugglers to hide the odor of marijuana. After obtaining this information, officers asked the M/V FORTY to follow them to Geohegan's Marina, located on the Rigolets across from Fort Pike.

After the M/V FORTY arrived at Geohegan's Marina, a United States Customs official boarded the vessel and entered the hold to compare the main beam number with the vessel's documentation papers. Customs officers noticed that the vessel was wet with pine oil, and contained food products from Colombia and Venezuela. They also found marijuana gleanings in the hold. After obtaining this evidence, all three men were arrested. As Arthur DesRoches produced identification he dropped several pieces of paper including the business card of Charles McGill into the water.

The prosecution established that the M/V FORTY passed under the Southern Railway bridge on November 3, 1981, at approximately 6:20 p.m., westbound into Lake Ponchartrain. The railway bridge is west of the Fort Pike boat launch so a vessel entering Lake Ponchartrain from the Gulf of Mexico would first pass the boat launch at Fort Pike (on the Rigolets which connects Lakes Ponchartrain and Borgne) and then go under the railway bridge into Lake Ponchartrain. A

vessel resembling the Robalo passed the bridge westbound at 7:23 p.m. The FORTY came through the bridge eastbound out of Lake Ponchartrain at 11:24 p.m. and the vessel resembling the Robalo was behind the FORTY and cleared the bridge at 11:25 p.m. Only ten other vessels passed under the bridge between 6:20 and 11:25 p.m.

State police officers continued to maintain a surveillance over suspects Merrill and McGill at the Ramada Inn in Slidell, Louisiana. Between 12:30 p.m. and 2:00 a.m. the officers observed movement and visiting between the rooms of Merrill, McGill, and another guest—Vernon Holt. At approximately 9:00 a.m. the next day, November 4, the three men left the Ramada Inn in separate vehicles. Merrill and McGill drove east on Interstate 10 while Holt went west. All three individuals were stopped and arrested by Louisiana State Police officers.

An investigation of records of telephone calls at the Ramada Inn revealed that a call had been placed from Vernon Holt's room to occupants of a residence at 129 Roan Lane in Lacombe, Louisiana, a community approximately twelve miles from Slidell. The residence was already under surveillance for suspected narcotics activity and Patrick Murray a/k/a James Murphey and John Hartsel were observed on the premises at approximately 9:09 a.m. on November 4. State police arrested Murray as he left the residence. Officers then approached Hartsel in the front yard of the residence; as he attempted to enter the house he was asked to stop and give his name. As Hartsel identified himself, agents noticed marijuana gleanings on the ground and

Hartsel was arrested and informed him of his rights. Hartsel was asked if marijuana was being concealed on the premises and he responded: "I didn't put it there." The premises were then secured while authorities obtained a search warrant. When the residence was searched approximately 1,500 pounds of marijuana were found.

A government expert was able to place the M/V FORTY at the Roan Lane address because several of the tires used as bumpers on the stern of the vessel left distinctive impressions on the dock. This and other circumstantial evidence supported the prosecution's theory that the Robalo led the M/V FORTY from Lake Pontchartrain through the connecting bayous and canals to the Roan Lane residence where the FORTY discharged a large quantitiy of marijuana.

Each defendant challenges the district court's denial of his motion to suppress evidence seized at the time of arrest. These challenges turn on the propriety of each arrest and seizure of evidence pursuant to that arrest. Defendants Charles McGill, Arthur DesRoches, Patrick Murray, and John Hartsel also disagree with the trial court's determination that the evidence supports the guilty verdict rendered against them. The government challenges the trial court's conclusion that the evidence was insufficient to support the guilty verdicts rendered against Cori DesRoches and Gary Merritt. Our review of the rulings on the suppression motions requires an examination of the record to determine police knowledge of inculpating facts at the time of each arrest. A broader review of the record is required to determine whether the evidence supports the verdict as to each defendant. We are mindful of the guiding principles. There must be substantial evidence and if more than one reasonable

construction of the evidence is possible, we must take the view most favorable to the government. *See United States v. Freeman*, 660 F.2d 1030, 1034 (5th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982). We now turn to the challenge of each appellant.

II.

A. CHARLES McGILL

In support of his argument that his motion to suppress was improperly denied, McGill contends that the district court's findings of fact are clearly erroneous and that the district judge should not have relied on evidence introduced at trial to support the court's pretrial denial of the motion to suppress. The court's findings are not clearly erroneous and evidence adduced at the suppression hearing supports the court's determination that McGill's arrest was legal.

At the time McGill was stopped on Interstate 10, the officers had knowledge of enough facts to establish probable cause for arrest. "Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Draper v. United States*, 358 U.S. 307, 313 (1959). When McGill was stopped the officers knew: (1) the customs tip, (2) McGill was associating with Merrill, a suspected narcotics smuggler, (3) McGill had taken a circuitous route from the Ramada Inn to Fort Pike, (4) the Robalo had been on Lake Ponchartain at night without lights in close proximity

to the FORTY, (5) the remarks of Merrill or McGill at the Fort Pike landing indicated a rendezvous with another vessel had occurred, (6) marijuana gleanings had been discovered aboard the M/V FORTY. In light of these facts, the district court was not clearly erroneous in denying McGill's motion to suppress.

Even if the arrest was illegal, McGill voluntarily signed a form consenting to the search. Evidence obtained from an informed and voluntary consent to search is admissable despite an illegal arrest. *See, e.g., United States v. Troutman*, 590 F.2d 604, 606-07 (5th Cir. 1979); *United States v. Fike*, 449 F.2d 191, 192-93 (5th Cir. 1971); *Bretti v. Wainwright*, 439 F.2d 1042, 1045-46 (5th Cir. 1971).

McGill also contends that there was insufficient evidence to support his conviction. "The standard of review of the sufficiency of the evidence in a criminal case is whether a 'reasonable trier of fact could [have found] that the evidence establishe[d] guilt beyond a reasonable doubt.' " *United States v. Michelena-Orovio*, 719 F.2d 738, 742 (5th Cir. 1983) (en banc), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1605, 80 L.Ed.2d 135 (1983). In addition to the facts outlined above, additional evidence adduced at trial tended to show that: (1) Holt paid for McGill's motel room; (2) a call was made from Holt's room to the 129 Roan Lane residence; (3) the M/V FORTY docked at 129 Roan Lane where her cargo of marijuana was unloaded.

McGill argues that Sgt. Stanley Hughes should not have been allowed to testify to the possible meaning of three words found on a sheet of paper in Merrill's

possession. McGill maintains that the testimony was unreliable, did not assist the jury, and its prejudicial effect outweighed any probative value. Hughes had over seven years of experience with the Louisiana State Police performing investigative and undercover work in numerous smuggling conspiracies. Sgt. Hughes was qualified to render an opinion as to the meaning of the words "Phoenix", "Dragon", and "Home Place". The district court did not abuse its discretion in permitting the expert testimony. *See United States v. Carson*, 702 F.2d 351, 369 (2nd Cir. 1983); *United States v. Alfonso*, 552 F.2d 605, 618 (5th Cir. 1977).

When McGill was arrested, a "bearcat scanner' radio was seized. Officer Segur testified that when other officers pressed the buttons on the scanner the frequencies that appeared were used by local police, DEA, and U.S. Customs.

McGill argues that the prosecution violated Federal Rule of Criminal Procedure 16(a)(1)(D)[1] by failing to produce the examination or test results showing that the radio was set on these frequencies. The government

---

[1]Federal Rule of Criminal Procedure 16(a)(1)(D) states:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

argues that this evidence does not fall within the scope of Rule 16(a)(1)(D).

Even if the government should have produced this evidence, the failure to do so does not merit a reversal unless the defendant can demonstrate prejudice. *See United States v. DeWeese*, 632 F.2d 1267, 1272 (5th Cir. 1980); *United States v. Arcentales*, 532 F.2d 1046, 1050 (5th Cir. 1976). Segur's testimony was subsequently struck from the record and the jury instructed to disregard it because he had no personal knowledge of the frequencies used by law enforcement agencies. Assuming there was a Rule 16 violation, we find no prejudice to McGill.

B. ARTHUR DESROCHES, GARY MERRITT AND CORI DESROCHES

Arthur DesRoches, captain of the M/V FORTY, and his crew members, Gary Merritt and Cori DesRoches, contend that when state authorities stopped the M/V FORTY on Lake Ponchartrain there was an improper investigatory stop or illegal arrest and all evidence seized from the subsequent search of the vessel should have been suppressed at trial. The government argues that the stop was a proper investigatory stop under *Terry v. Ohio*, 392 U.S. 1 (1968) in which the Court noted: "[I]n determining whether [a] seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio, supra* at 19-20.

At the time the local police stopped the M/V FORTY, they had recieved the tip from customs, the Robalo had

just returned to the Fort Pike boat launch without lights after being on the lake for five to six hours, and Merrill, a suspected smuggler, was aboard the Robalo. Vessel traffic was light on Lake Ponchartrain at this time of night; the officers were justified in suspecting that the FORTY, a larger vessel in the same area of Lake Ponchartrain as the Robalo, had met with the Robalo and was engaged in a conspiracy to import marijuana. The officers flashed a blue light and directed the FORTY to stop. As the patrol boat pulled alongside the M/V FORTY, the officers detected the smell of pine oil. The officers were then informed that the vessel was from Miami and was diving for treasure. After obtaining this information police suspicions were aroused further so the officers asked the FORTY to follow them to Geohegan's Marina. All questions were asked by police from the patrol boat, and the FORTY followed the patrol boat to the marina. After the vessel docked at the marina, officers secured the vessel by directing the crew to produce any weapons on board, and requiring them to stand on the dock while officers made a cursory inspection for additional occupants aboard the vessel.

As local police took these precautions, United States Customs agents arrived and requested documentation papers from Captain DesRoches.[2] Customs agents

[2]19 U.S.C. §1581 (1976) states:

> (a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents

discovered marijuana gleanings in the hold while they were checking the main beam number. These gleanings were properly seized because they were discovered in plain view during a documentation check.[3] Upon discovery of the marijuana gleanings, officers placed DesRoches and his crew under arrest.

Police encounters with the public can be divided into three separate levels: (1) an officer may approach a citizen at anytime and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been or is being committed. See *Florida v. Royer*, ____ U.S. ____, 103 S.Ct. 1319, 1324-25, 75 L.Ed.2d 229, 236-37 (1983).

The record fully supports the view that at the time the M/V FORTY was stopped the officers had an "articulable suspicion"—that the FORTY was engaged in drug trafficking. The officers were therefore justified

(Footnote 2 Continued)

> and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

[3]See *United States v. Villamonte-Marquez*, ____ U.S. ____, 103 S.Ct. 2573, 2581-82, 77 L.Ed.2d 22, 32-34 (1983).

in requiring the vessel to stop so the crew could be questioned. The responses to the questions added to the officers' suspicions so the FORTY was asked to go to a nearby marina. The district court's conclusion that the M/V FORTY voluntarily consented to go to the marina is not clearly erroneous. Once the vessel docked, the actions taken by officers in securing the vessel to assure their safety were reasonable and not so intrusive as to constitute an illegal search. See *Michigan v. Long*, ____ U.S. ____, 103 S.Ct. 3469, 3481-82, 77 L.Ed.2d 1201, 1220-21, (1983); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). After customs agents discovered the marijuana gleanings, they had probable cause to believe an offense had been committed and properly proceeded with an arrest. The record fully supports the trial court's denial of the defendant's motion to suppress.[4]

Serious questions are presented to us as to whether evidence is sufficient to sustain the convictions of these three defendants.

The jury apparently concluded as it was entitled to do, that the FORTY accomplished its mission of delivering a load of marijuana to the Roan Lane residence. Maps and food aboard the vessel indicated that it had just arrived from South America. The jury probably

[4]Patrick Murray and John Hartsel join Arthur DesRoches in asserting that the warrantless stop, arrest, and seizure of the M/V FORTY and its crew were unconstitutional. We reject these contentions for the same reasons stated above. Additionally, Hartsell points to no facts established in the record which give him standing to claim a fourth amendment violation in connection with the seizure of evidence from the M/V FORTY. See *United States v. Salvucci*, 448 U.S. 83, 85 (1980); *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978).

concluded that it was unlikely that the FORTY sailed from Colombia to southeast Louisiana, unloaded, and then on some remote Lake Ponchartrain dock, found a fresh crew from Florida and the Virgin Islands. The FORTY had been unloaded only a matter of hours before she was stopped, and if the crew had been aboard when the vessel was unloaded the jury could have inferred their assistance in discharging the cargo of marijuana. There was no evidence however as to when the crew boarded the vessel.

The district court concluded that with respect to the two crewmembers, Gary Merritt and Cori DesRoches, the absence of this link in the government's evidence was fatal; the trial judge reached a different conclusion, however, as to Captain Arthur DesRoches and found the evidence supported his conviction. We do not disagree with these conclusions.

We are called upon to decide as to each defendant, "whether the evidence, examined in a light most favorable to the government, was sufficient to support the jury's conclusion that the defendant was guilty beyond a reasonable doubt." *United States v. Varkonyi*, 611 F.2d 84, 85-86 (5th Cir. 1980).

Except for the circumstantial evidence noted above, which pointed toward the improbability of crew change following the time the marijuana was unloaded, the only evidence of involvement by the two crewmembers in the conspiracy was their presence aboard the FORTY. When the FORTY was stopped she had been unloaded and only minute quantities of marijuana were found. No evidence was admitted that either of the crewmembers made statements to the police which were untrue or

reflected knowledge on their part that their vessel was engaged in illegal activity. The fact that Cori DesRoches was Captain Arthur DesRoches' brother and Vernon Holt's stepson is insufficient to bridge the gap in the evidence to support the jury verdict against Cori DesRoches. A thorough review of the record persuades us that the trial court correctly entered judgments of acquittal for Merritt and Cori DesRoches.

We also agree with the trial court that the evidence was sufficient to sustain Captain Arthur DesRoches' conviction. In addition to the circumstantial evidence which justified a jury conclusion that the crew had probably not been changed following the discharge of the cargo of marijuana, Captain DesRoches made at least two statements and took action which the jury was entitled to conclude was inconsistent with his plea of not guilty. First, the jury was entitled to conclude that Captain DesRoches lied about the mission of the FORTY when he told St. Tammany Parish police officers that the vessel was hunting for treasure on Lake Ponchartrain. The government established that even if it had been feasible to dive for treasure in Lake Ponchartrain the FORTY did not have the equipment to dive for treasure. Also, the jury was entitled to conclude that Captain DesRoches had directed the use of an inordinate amount of pine oil to wash down the decks of the vessel for the purpose of masking the odor of marijuana. Additionally, as Captain DesRoches and his crew were standing on the dock and while the customs officers were inspecting the vessel, DesRoches attempted to discard two business cards. Officers were successful in retrieving these items from the water where DesRoches had dropped them. They included

Charles McGill's business card and the card of attorney Andrew Thornton (whose card was also held by Merrill).

We conclude that the record is sufficient to support Arthur DesRoches' conviction.

C. PATRICK MURRAY A/K/A JAMES MURPHEY

Murray also challenges the validity of his arrest and the sufficiency of the evidence to support his conviction. On November 4, following the arrest of Charles McGill, Richard Merrill, and Vernon Holt and the crew of the FORTY, police learned that a call had been placed from Holt's motel room to the Roan Lane residence. The residence was already under surveillance for suspected narcotics activity unrelated to the acts of defendants in this case. Officers had observed John Hartsel and Patrick Murray a/k/a James Murphey at the residence. Murray was observed entering and leaving the residence several times. On November 4, between 11:00 a.m. and noon, government agents sensed that Murray had detected their surveillance and was fleeing the scene. An officer stationed a quarter mile from the residence was ordered to arrest Murray as he departed the area. While Murray was stopped and searched, he informed officers that he had just stopped at 129 Roan Lane to ask directions. Murray was then placed under arrest and taken back to the residence. Murray contends that his arrest was illegal because at that time the only evidence that tended to link him to the conspiracy was a telephone call from the suspects at the Slidell Ramada Inn to the Roan Lane residence. We agree that the arresting officer did not have probable cause to arrest Murray.

After Murray's arrest, he was taken back to 129 Roan Lane. At the residence, Murray was informed of his Miranda rights and his right to refuse to permit officers to search his car. Murray then signed a consent to search form. Officers found $2,000 cash and an airline ticket in the trunk, and a rental agreement for the car in the glove compartment. In view of Murray's consent, the trial court did not err in admitting the evidence. See, *e.g.*, *United States v. Troutman*, 590 F.2d 604, 606-07 (5th Cir. 1979); *United States v. Fike*, 449 F.2d 191, 192-93 (5th Cir. 1971); *Bretti v. Wainwright*, 439 F.2d 1042, 1045-46 (5th Cir. 1971).

Sufficient evidence was produced to support Murray's conviction: (1) Murray owned the M/V FORTY, (2) a call had been placed from Vernon Holt's room to 129 Roan Lane, (3) Murray was present at 129 Roan Lane, (4) the M/V FORTY unloaded marijuana at the Roan Lane residence, and (5) 1,500 pounds of marijuana were discovered at the Roan Lane residence.

D. JOHN HARTSEL

Hartsell also challenges the validity of his arrest and the sufficiency of the evidence to support the verdict. When Murray left the Roan Lane premises, officers decided to approach Hartsel in the front yard of the residence. As officers approached, Hartsel moved towards the house. Officers asked Hartsel to stop and as officers were asking questions, marijuana gleanings were discovered on the ground surrounding Hartsel. A closer investigation revealed particles of marijuana in the driveway and in the back of several trucks. Hartsel was then arrested and informed of his rights. In response to

the question of whether marijuana was on the premises, Hartsel replied: "I didn't put it there." The premises were then secured and a search warrant was obtained. A search revealed approximately 1,500 pounds of marijuana in the home.

Hartsel argues that the police were trespassing on the premises and had no right to approach him in the yard in front of the Roan Lane residence. This contention is meritless. When an officer enters upon private property to perform his duty, his conduct, otherwise a trespass, is justified. See *United States v. Knight*, 451 F.2d 275, 278-79 (5th Cir. 1971), *cert. denied sub nom. Grubbs v. United States*, 405 U.S. 965 (1972).

We agree with the district court that sufficient evidence was adduced to convict Hartsel. This includes: (1) the telephone call from the suspects at the Ramada Inn to the Roan Lane residence, (2) the M/V FORTY discharged marijuana at Roan Lane, (3) Hartsel's extended presence at the residence, (4) evidence of marijuana on the premises, and (5) Hartsel's admission that he had knowledge of the presence of marijuana.

III.

Accordingly, the convictions of Charles McGill, John Hartsel, Patrick Murray a/k/a James Murphey, and Arthur DesRoches are AFFIRMED and the acquittals of Gary Merritt and Cori DesRoches are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 82-3736

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES McGILL,

Appellant.

PETITION FOR REHEARING

Appellant, CHARLES McGILL, by and through his undersigned attorney and pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully requests this Honorable Court to grant him a rehearing in this cause. As grounds therefor, it is respectfully submitted that:

1. Rehearing in this matter is sought because the Court, in its Opinion, has overlooked several important points of law and fact as more fully set forth below.

2. On June 29, 1984, this Court rendered its decision affirming Appellant's convictions for the offenses of conspiracy to import marijuana; importation of marijuana; conspiracy to possess with intent to distribute marijuana; and possession with intent to distribute marijuana.

3. In affirming Appellant's convictions, this Court rejected Appellant's contentions that his Motion to Suppress was improperly denied; that the trial court

abused its discretion in allowing a Government witness to testify as an expert with regard to the meaning of certain words found on a sheet of paper in the possession of the co-defendant Merrill; that the trial court erred in permitting the Government to elicit, on rebuttal, highly damaging testimony at trial without complying with the requirements of Fed.R.Crim.P. 16; and, finally, that there was insufficient evidence to sustain the jury's verdicts of guilt.

4. Specifically with regard to the denial of Appellant's Motion to Suppress Post-Arrest Statements and Physical Evidence (Appellant's Brief – Point I), Appellant had contended, *inter alia*, that the trial court had improperly relied on facts elicited not at the hearing on the Motion to Suppress, but, rather, upon evidence introduced at trial. In its Opinion, this Court acknowledged the argument, but concluded that: "Evidence adduced *at the suppression hearing* supports the court's determination that McGill's arrest was legal." (Opinion at page 7). The Court then determined that the trial court correctly found probable cause to arrest Appellant, thereby justifying the ensuing search. In support of its determination that probable cause existed for the arrest of Appellant, this Court refers to the establishment of the following six facts:

1) the Customs tip,

2) McGill was associating with Merrill, a suspected narcotics smuggler,

3) McGill had taken a circuitous route from the Ramada Inn to Fort Pike,

4) the Robalo had been on Lake Ponchartain [sic] at night without lights in close proximity to the FORTY,

5) the remarks of Merrill or McGill at the Fort Pike landing indicated a rendezvous with another vessel had occurred, and

6) marijuana gleanings had been discovered aboard the M/V FORTY.

(Opinion at page 8).

5. Of the above listed facts which this Court cited in support of the district court's finding of probable cause, there is absolutely no support in the Record of the suppression hearing for that contained in Paragraph 3. With respect to paragraph (4), the testimony established that while the Robalo had departed Fort Pike, without lights, around dusk (i.e. 5:50 P.M., see MTS. 51-52), it returned at approximately midnight with lights on. (MTS. 45). Nor, it is submitted, is there any testimony to establish that the Robalo was "in close proximity to the FORTY". Finally, there is no support in the Record that the remark referred to in paragraph (5) actually indicated a rendezvous with another boat. Such a finding is pure conjecture.

6. Accordingly, the facts relied on by this Court to affirm the trial court's finding of probable cause are not fully supported by the Record. Minus the erroneous findings, as outlined above, there was not sufficient evidence adduced at the suppression hearing to support the district court's determintion of probable cause.

7. Even if the trial court correctly considered the facts elicited at trial in support of its determination that there was probable cause for the arrest of Appellant by the side of the road, this Court has failed to consider that many of the findings relied on by the trial court in support of its ruling, as reflected in the Record, are clearly erroneous. For example, the trial court found that the Robalo, occupied by Appellant and the co-defendant Merrill, passed under a bridge immediately behind the FORTY. (R.E. 67). In its Opinion, this Court eluded to that finding in the factual portion of its Opinion. (Opinion pages 4-5). This finding by the trial court was clearly in error. Not only was no connection established on Lake Ponchartrain between the Robalo and the FORTY, but, in fact, the trial testimony of the bridge tender negated any suggested connection between the FORTY and the Robalo under the railroad bridge. (Initial Brief at page 12, n.10). In its Opinion, this Court failed to consider several other findings of the trial court which, as methodically delineated in the Brief of Appellant (pages 25-28), have no support in the Record and are inaccurate.

8. Alternatively, this Court found that "[e]ven if the arrest was illegal, McGill voluntarily signed a form consenting to the search." (Opinion at page 8). This finding is in clear contradiction to the previously expressed law of this Circuit, as set forth in *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980) that:

> . . . a voluntary consent to search does not remove the taint of an illegal seizure. Rather, *voluntariness is merely a threshold requirement.* The 'causal connection' between the illegal seizure and the consent to search must be

> independently examined, utilizing the factors set out in [*Brown v. Illinois*, 422 U.S. 599, 95 S.Ct. 2254 (1975)] in light of the policies to be served by the Fourth Amendment exclusionary rule.
>
> *Robinson* at 1220. [Emphasis added].

9. In light of *United States v. Robinson*, 625 F.2d 1211 (5th Cir. 1980), coupled with the clear mandate of *Brown v. Illinois*, 422 U.S. 599, 95 S.Ct. 2254 (1975), a mere determination of voluntariness is not sufficient to abrogate consideration of Fourth Amendment requirements. *Brown* at 2260-2261. While Appellant by no means concedes that his consent was voluntary, even if this Court has determined it to be so, that finding is insufficient, in and of itself, to purge the taint resulting from an illegal arrest. Accordingly, to the extent that this Court alternatively relied on the voluntariness of Appellant's consent to support the search of Appellant's vehicle, as well as the legality of the statements made by Appellant immediately following his arrest, this Court has failed to consider the requirements of *Brown v. Illinois* and *United States v. Robinson.*

10. In affirming Appellant's conviction, this Court also rejected Appellant's contention that the evidence was sufficient to support the jury's verdicts of guilt. (Opinion at pages 8-9). In so doing, the Court relied, *inter alia*, on the recitation of facts established in the initial pages of its Opinion. At two places in the Court's Opinion, the Court emphasized the fact that after the FORTY was required to dock, its captain, Arthur DesRoches ". . . dropped several pieces of paper including the business card of Charles McGill into the water."

(Opinion at page 4; see, also, Opinion at page 16). During Appellant's trial, the three documents which were retrieved from the water behind Arthur DesRoches, were not allowed into evidence by the trial court. (Tr. 720, 742-743, 943-944). Accordingly, this Court erroneously relied on that testimony, which established a link between Appellant and the FORTY, in finding the evidence sufficient to support Appellant's conviction. In view of the trial court's ruling excluding this evidence from consideration by the trier of fact, it is respectfully submitted that this Court must reconsider its holding that there was sufficient evidence to support Appellant's convictions for all four offenses. It is submitted that, in the absence of this testimony, the evidence was not sufficient to sustain the verdicts.

11. Finally this Court rejected Appellant's contention that the trial court erred in permitting testimony regarding police radio frequencies found on the Bearcat Scanner seized from Appellant and Merrill, in view of the Government's failure to comply with Fed.R.Crim.P.16. (Opinion at pages 9-10). In its Opinion, the Court circumvented the issue of whether the Government failed to comply with the Rule and held that even if there was a discovery violation, there was no showing of prejudice by Appellant.

12. It is difficult to envision a scenario where the prejudice to the Appellant is more apparent than in this case. The Government had failed to disclose to counsel for Appellant, who had invoked the provisions of Rule 16, that the Bearcat Scanner had been tested and that, as a result of the tests, it had been learned that the Scanner was programmed to monitor local, State, and Federal police radio frequencies! Not only

was this testimony blatantly prejudicial to Appellant, but its significance was heightened by the fact that it was elicited from the witness by the Appellant's own (rather embarrassed) attorney! In its treatment of this issue, this Court has failed to consider first, that the tests performed on the Bearcat Scanner were clearly within the purview of Fed.R.Crim.P.16(a)(1)(D). Secondly, this Court has chosen to disregard the obvious; that is, that this testimony was highly prejudicial to Appellant. In determining whether or not Appellant was prejudiced by the testimony, this Court need only ask itself whether it truly believes that Appellant's counsel would have asked the question regarding frequencies on the Bearcat Scanner if he had in fact known in advance the answer he was going to receive!

13. On this issue, this Court also finds that, even if there was error in the admission of this testimony, the subsequent striking of the testimony from the Record, and the cautionary instruction given to the jury by the Court, was sufficient to overcome any prejudice occasioned thereby. Under the circumstances of this case, and considering the highly damaging nature of the testimony, the transparent nature of this justification is apparent. As noted by Mr. Justice Jackson in *Krulewitch v. United States*, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." 336 U.S. 440, 453, 69 S.Ct. 716, 723 (1949).

14. Furthermore, this Court has failed to consider that, notwithstanding the striking of this testimony from the Record and the cautionary instruction to the jury to disregard it, the Government was subsequently permitted to introduce the testimony of Trooper Leland Dwight, who testified (over defense objection) to the

radio frequencies of the various agencies previously alluded to in the stricken testimony of Officer Segur! By permitting this testimony, the Court obviously reinforced the testimony of Trooper Segur which it previously had stricken and absolutely emasculated any positive effects of the cautionary instruction which it had given to the jury. Accordingly, this Court's holding that there was no prejudice to Appellant occasioned by the Rule 16 violation misapprehends the actual facts contained in the Record attendant to this issue, as well as the legal efficacy of a cautionary instruction under the facts of this case.

WHEREFORE, Appellant, CHARLES McGILL, respectfully requests this Honorable Court to enter its Order granting him a rehearing in this cause.

Respectfully submitted,

GLASS & REED
Attorneys for Appellant
338 Lafayette Street
New Orleans, Louisiana 70130
Telephone: (504) 581-9065

By: ROBERT GLASS, ESQ.

JOEL HIRSCHHORN, P.A.
Attorneys for Appellant
2766 Douglas Road
Miami, Florida 33133
Telephone: (305) 445-5320

By: Joel Hirschhorn
JOEL HIRSCHHORN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of July, 1984, a true and correct copy of the foregoing Petition for Rehearing was mailed, postage prepaid, to the following:

Howat Peters, Esq.,
Assistant United States Attorney
500 Camp Street
New Orleans, Louisiana 70130

Louis Vernell, Esq.
420 Lincoln Road
Miami Beach, Florida 33139

Robert N. Habans, Jr., Esq.
630 Camp Street
New Orleans, Louisiana 70130

Joel Hirschhorn

/s/ JOEL HIRSCHHORN

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
July 30, 1984

Mr. Louis Vernell
Attorney at Law
160 Sunny Isles Boulevard, No.
Miami Beach, Florida 33160

Nos. 82-3689 U.S.A. v. Gary Merritt
82-3736 U.S.A. v. Charles McGill

Dear Mr. Vernell:

In cause No. 82-3736 your petition for panel rehearing on behalf of Hartsell and Murray was received and filed timely on July 27, 1984. A petition for panel rehearing was also filed on behalf of McGill on July 12, 1984. These petitions are presently under submission to the Court and upon ruling, the parties will be notified.

In this same cause (82-3736) the mandate issued today, July 30, 1984, as to appellant Arthur Desroches as no petition for rehearing was filed nor was a motion to stay the issuance of this mandate received.

In cause No. 82-3689, *U.S.A. v. Gary Merritt & Cori Desroches*, no petition for rehearing was filed nor any motion to stay the issuance of the mandate; the judgment as mandate in this cause issued July 23, 1984, closing this appeal.

I am returning herewith, unfiled, the following documents as they are unnecessary:

1. Motion for stay of mandate as to Hartsel and Murphy, but not as to defendants Gary Merrit and Cori Desroches,

2. Motion for issuance of mandate, as to defendants Gary Merrit and Cori Desroches, but not as to Hartsel and Murphy,

3. Motions to adopt motions for stay of mandate, motions for rehearing, etc.

4. Motion for leave to file the above motions out of time.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ Joan Perkins
Joan Perkins
Case Manager

JP/ml
Enclosure

cc: Mr. Howat A. Peters, Jr.
Mr. Steven Lemoine
Mr. James G. Roth
Mr. Joel Hirschhorn
Mr. Robert Glass
Mr. Robert N. Habans, Jr.

[FILED AUG 30 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-3736

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS.

CHARLES McGILL, JOHN HARTSEL,
PATRICK MURPHY, a/k/a JAMES MURPHEY
and ARTHUR DESROCHES,
Defendants-Appellants.

Appeal from the United States District court for the Eastern District of Louisiana

ON PETITIONS FOR REHEARING
(August 30, 1984)
(Opinion June 29, 1984)

Before TATE, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

We find merit to McGill's argument on application for rehearing that the following statement in our opinion at 736 F.2d 228 represents an erroneous conclusion of law: "Even if the arrest was illegal, McGill voluntarily signed a form consenting to the search. Evidence obtained from an informed and voluntary consent to search is admissible despite an illegal arrest." (citing cases)

The above statement is not essential to the opinion and is deleted.

Except as noted above, the petitions for rehearing filed in the above entitled and numbered cause are denied.

[CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.]

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
600 CAMP STREET
NEW ORLEANS, LA 70130
September 11, 1984

GILBERT F. GANUCHEAU
CLERK

Ms. Loretta G. Whyte, Clerk
United States District Court
500 Camp Street, Room C-151
New Orleans, LA 70130

No. 82-3736 — USA -vs- Charles McGill
USDC# CR 81 400 "B"

☒ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

☒ Copy of the Court's opinion.

☐ Original record on appeal or review. RETAINED PENDING CASE #82-3689)

☐ Original exhibits.

☐ Bill of Costs approved by this Court.

☐ Copy enclosed to counsel.

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By: Della M. Jones
Deputy Clerk

cc: (Letter Only)
Honorable Frederick J. R. Heebe
Mr. Joel Hirschhorn
Mr. Louis Vernell
Mr. Robert N. Habans, Jr.
Mr. Robert Glass
Mr. Howat A. Peters, Jr.

[FILED OCT – 1 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3736

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES McGILL, JOHN HARTSEL,
PATRICK MURPHY, a/k/a JAMES MURPHY
and ARTHUR DESROCHES,
Defendants-Appellants.

**Appeals from the United States District Court
for the Eastern District Louisiana**

ORDER:

☒ The motion of *Charles McGill, Arthur Desroches and Patrick Murray*, for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☐ The motion of *Charles McGill, Arthur Desroches and Patrick Murray*, for recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including *September 30, 1984*, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed

with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ W. EUGENE DAVIS
UNITED STATES
CIRCUIT COURT JUDGE
W. EUGENE DAVIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
v
JAMES MURPHY, JOHN HARTSELL, et al
Defendants

CRIMINAL DOCKET 81-400

MOTION TO SUPPRESS
and INCORPORATED
MEMORANDUM OR LAW

The Defendants JAMES MURPHY and JOHN HARTSELL, by their undersigned attorneys, respectfully move this Honorable Court to grant the within Motion to Suppress, stating as follows:

I. ITEMS TO BE SUPPRESSED

The Defendants seek to suppress and to consequently exclude from introduction into evidence and/or use, whether derivative or otherwise, all items seized, procured or otherwise obtained from:

(1) The person(s) of the Defendant James Murphy and the Defendant John Hartsell;

(2) The residential property described as 129 Roan Lane, La Comb, Louisiana;

(3) The vehicle operated by the Defendant James Murphy on November 4, 1981;

(4) The three vehicles parked and/or located upon the premises described as 129 Roan Lane, La Comb, Louisiana;

(5) All statements made by the Defendant James Murphy and/or the Defendant John Hartsell during and subsequent to the detention and arrest of such individuals, and

(6) All "fruits", leads and/or evidentiary matter derived from any of the foregoing sources.

II GROUNDS FOR SUPPRESSION

(1) That such evidence was procured and otherwise obtained as a result of illegal search(es) and seizure(s) effected in contravention of the laws and constitutions of the United States of America and the State of Louisiana;

(2) That such evidence was procured, seized and otherwise obtained without Defendants' consent and without lawful authority or process of law, in that the same was effected without probable cause or lawful warrant.

(3) The notwithstanding the absence vel non of probable cause, no exigent circumstances were present, sufficient to either authorize or justify;

(a) That warrantless stopping and consequent search of Defendant's vehicle

(b) The warrantless entry upon, and search of, private property.

(c) The warrantless search of vehicles lawfully parked and otherwise located upon private property.

(4) That such evidence was procured and otherwise obtained as a result of warrantless, exploratory and/or unreasonable search(s) and/or the same were otherwise the product of unlawful taint as constituting "fruits of the poisonous tree".

(5) That such evidence was procured and otherwise obtained as a result of the illegal arrest and/or unlawful detention of Defendants without warrant and/or probable cause.

(6) That in the event such evidence is alleged to have been procured or seized pursuant to warrant issued, such seizure and attendant search are otherwise and further unlawful in that:

(a) The warrant and underlying affidavit are insufficient on their face:

(b) No probable cause existed or was otherwise demonstrated to support the issuance of such warrant, and

(c) The issuance of such warrant and the consequent service and return thereon, failed to comport with statutory and essential requirement of the law.

(7) That any statements, admissions and/or confessions elicited by and/or otherwise obtained from the Defendant(s) herein are violative of such Defendant(s)' constitutional rights and guarantees as set forth in the

Fifth and Sixth Amendments to the Constitutions of the United States and are otherwise in contravention of the pronouncements made in *Miranda v Arizona*, 386 U.S. 436 (1966) and *Brown v Illinois*, 422 U.S. 590 (1975).

III. STATEMENT OF FACTS

Although additional matters circumscribing the within Motion may be elicited at the forthcoming evidentiary hearing, it is submitted that the following facts (obtained through discovery and investigative processes) may well be controlling to an extent as to make requisite the granting of the within Motion, viz:

Although the underlying investigation, as well as the indictment, reflects upon acts and activities occuring prior to November 4th, 1981, it was not until the morning of such date that Defendants Murphy and Hartsell were first observed by law enforcement agents at and/or near the residential property described as 129 Roan Lane, La Comb, Louisiana. As alleged, such residential abode had been under continual surveillance and "intense investigation" for approximately "ten months by multiple Law Enforcement Agents"; however, *at no time* prior to such date of November 4th, 1981 was either the Defendant Murphy or the Defendant Hartsell ever seen or observed on, near, or even away from such property.

Albeit, and as incident to such surveillance activities, Defendant Murphy was first observed to arrive in a rental car and to thereupon engage in a conversation with Defendant Hartsell. From their vantage point, the reporting agents were able to observe Murphy and Hartsell conversing and drinking a beverage from a

"green bottle". Despite the almost incredible clarity and detail of such observations, no proscribed, illegal, or indeed, suspicious activity of any nature was otherwise observed.

Albeit, and shortly thereafter, Defendant Murphy entered his vehicle and left the residence. After driving a distance of approximately two blocks, his vehicle was abruptly stopped by numerous Law Enforcement Agents, whose cars were maneuvered to block and otherwise intercept his vehicle. Murphy was then directed to "drive back to" the 129 Roan Lane property, which he proceeded to do. Upon arrival, he was directed to stop at the rear of the residence. During the drive to the property, Law Enforcement vehicles closely followed, as well as preceeded, his vehicle.

Immediately upon stopping his vehicle at such residence, numerous other Law Enforcement vehicles (at least eight) converged upon the property. Murphy was ordered out of his car and told to stand beside the same. He was informed that while he was not under arrest, he was "being detained for questioning" and that he would have to remain where he was. At the same time, other agents drove to the front of the house and confronted Hartsell, who was in the carporte. One of the numerous agents (approximately twelve) who converged upon the house, directed Hartsell to "freeze". Murphy was then brought around to the carporte where both he and Hartsell were told to stand still. Except for those agents "standing guard" each of the other agents "fanned out", going in different directions, both in and out of the house, as well as the surrounding areas. Within moments, one of the agents exclaimed that he had found what he termed to be "gleanings" or "gleamings"

on the ground between the house and the dock area. Immediately following such announcement, both Murphy and Hartsell were placed under arrest, put in handcuffs, and told to sit on the floor. During their subsequent and continuous search of the premises, the agents further observed "gleanings" in three vehicles parked in the carports. Additionally, and after entering the house, the agents detected an odor of marijuana coming from a storage area connected to the residence.

After Murphy was tranported to jail the agents continued to detain Hartsell at the house, where he remained, handcuffed and seated on the cement floor of the carporte. During such period of detention, the agents continued their activities of entering and leaving the subject house and looking around the premises. Approximately six hours later a "search warrant"[1] was reportedly issued by a Louisiana State Court Judge. After the "issuance" of such warrant, the agents removed numerous bales of marijuana from the side storage area of the residence and other evidentiary items from the premises.

---

[1]With respect to such Search Warrant, it can only be *presumed* that one, in fact, was issued. Albeit, and despite two successive visits by undersigned counsel to the offices of the St. Tammany Parish District Attorney and the Clerk of Court; no record of such warrant could be found, nor could either of such offices provide any information as to the whereabouts of the same. Additional efforts to inspect such warrant through request made upon the Hon. Howat Peters, were similarly unavailing. Ergo, and as of this date, undersigned counsel has not had the opportunity to inspect the original and/or copy of such warrant nor any return made thereon, nor indeed, the original affidavit for search warrant, of which a somewhat illegible copy is attached to this Motion.

Both the Defendants were subsequently indicted with conspiracy to import marijuana and the importation thereof, and conspiracy to possess marijuana and the possession thereof.

IV. ISSUES AND ARGUMENT

A. In the absence of either probable cause and/or warrant, the stopping of Defendant Murphy's vehicle on a public street by means of an erstwhile "road block"; the consequent command that he drive the same to a particular residence and his subsequent "custodial type" detention constituted a warrantless and unlawful arrest and "seizure" of his person.

In considering the propriety vel non of such issue, it is submitted as being uncontraverted that at the time Murphy's vehicle was stopped approximately two blocks from the residential property described as 129 Roan Lane, La Combe, Louisiana, the "arresting" officers had neither lawful warrant nor probable cause to effect such constitutional intrusion.

The principle in this regard was squarely addressed by the Supreme Court in *Delaware v. Prouse*, 440 U.S. 648 (1979) where the Court held:

> "The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. *United States v Martinez-Fuerte*,

428 U.S. 543, 556-558, 96 S.Ct. 3074, 3082-3083, 40 L.Ed.2d 1116 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975); cf. *Terry v Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 29 L.Ed.2d 889 (1968) . . . " Id. at 653.

In considering the continued efficiency of one's Fourth Amendment rights while "traveling in an automobile" the Supreme Court decisively held:

> "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio, supra*, recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. See *Adams v. Williams*, 407 U.S.

143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972)." Id. at 662, 663.

In accordingly alluding to the articulable facts present in the case sub judice, it is submitted that prior to Murphy's arrival at the Roan Lane residence, no agent had ever previously seen or observed him on the premises or, indeed elsewhere in the State of Louisiana. In even conceding that such residence was under continual surveillance and "intense investigation" for at least ten months preceeding November 4, 1981, Murphy's mere presence thereat, without more, is totally insufficient to establish probable cause. In this regard, the only actions observed while Murphy was on the premises, was in conversation with Hartsell (who was equally unknown to the agents) and their drinking a substance from a "green bottle". Significantly, in *U.S. v Cole*, 628 F2d 897 (1980) (5th Cir.) The 5th Circuit specifically admonished that the mere presence of an individual on premises suspected of illegal activity is not only insufficient to establish probable cause, but further fails to even provide the threshold for a "Terry-type" search for weapons.

The facts in *Cole* demonstrated that while agents were in the process of executing a valid search warrant on residential premises, the Defendant pulled into the attached carporte in a pick-up truck. Upon alighting from the truck, the agents immediately frisked him and uncovered a pistol on his belt, which was immediately seized, whereupon the Defendant was charged with unlawful possession of the firearm. In such case, the Fifth Circuit reversed the trial court's denial of such Defendant's Motion to Suppress, holding that his Fourth Amendment rights had been effectively denied, viz:

"The officer's pat-down of appellant canot be justified by appellant's mere presence on the premises during the execution of the warrant. 'A persons' mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search *that* person'. Ybarra v Illinois, 444 U.S. 85, 100 S. Ct. 338, 342, 62 L. Ed. 2d 238, 245 (1979). Mere presence neither obviates nor satisfies the requirement of Terry v. Ohio, 392 U.S., 1.88 S. Ct. 1868. 20 L. Ed 2d 889 (1968), that specific articulable facts support an inference that the suspect might be armed and dangerous. Ybarra, supra, 444 U.S. at 92, 100 S. Ct. at 343, 62 L. Ed. 2d at 246, 7. See also U.S. v Tharpe, 536 F. 2d 1098, 1100 (5th Cir. 1976) (en banc).

Nor does the fact that the officers testified that they had previously received information of an undisclosed nature about appellant constitute reason to search under *Terry.* Without knowledge of the content of the information the court cannot assess the reasonableness of the inference of dangerourness. The exceptions to the requirement of a warrant are narrow and jealously guarded and 'the burden is on those seeking the exemption to show the need for it'. Arjabsas v Sanders, 442 U.S. 753, 760, 99 S. Ct. 2586, 2591, 71 L. Ed. 2d 235, 242 (1979), quoting U.S. v Jeffers, 342 U.S. 48, 51, 72 S. Ct. 93, 95, 96 L. Ed. 59, 64 (1951). This burden was not met by testimony that the officers involved had prior information about

> appellant, absent proof that the information was of a sort from which an inference of dangerousness could reasonaby be drawn.
>
> Id. at 899.

> Since the frisk violated appellant's Fourth Amendment rights, the district court erred in refusing to suppress the pistol found on appellant's belt. Appellant's conviction on count five cannot stand."

Similarly, in *U.S. v Almas*, 507 F 2d 65. (Fifth Circuit, 1975) the Fifth Circuit otherwise considered the sufficiency of one's presence at and/or near the scene of unlawful activity in determining whether a vehicular stop was justified, and held:

> "The intrusion at issue in this case was the stopping of the van and the seizure and subsequent search of the suitcases contained in it. The probable cause supporting the search warrant for the apartment will not in itself justify the stopping of the van, absent additional circumstances."

Significantly, and in alluding to the nature and sufficiency of the "additional circumstances" constituting the sina qua non of a stopping and search of a vehicle, the Court in *Almas* mandated that the same must be existent "*at the moment of arrest*" and be "*sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense*'. *Citing *Adams v Williams*, 407 U.S. 143 (1972); *Beck v Ohio*, 379 U.S. 89 (1964) and *Beirecae v U.S.*, 338 U.S. 160 (1949)).

Coincidently, this very Court in *United States v. Davis*, (D.C. E.D. La. 1971) per the Honorable J. Heebe, considered a situation almost on all fours with that presented in the case at bar. In such case, the Harbor Police, acting on a tip provided by a reliable Informant, stopped a vehicle after being informed that the driver had been involved in numerous thefts and that he would be operating a particular vehicle. In resolving the threshold issue as to "when the arrest of Davis occurred", this Court held:

> "We think that Davis was arrested not at Harbor Police Headquarters by the Customs officer but by the Harbor Police when they, after stopping his car, took him to police headquarters. An arrest occurs not when the police officer formally announces the arrest but when the officers restrict the arrestee's freedom of movement in any significant way. *Henry v United States*, 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959); *United States v Stafford*, 303 F. Supp. 785 (D. Del. 1969). Here, Captain Floyd asked Davis to proceed to headquarters and had another harbor policeman accompany Davis there in Davis's car. While Davis was not formally told he was under arrest, Captain Floyd testified that had Davis refused to go to headquarters, he would have been arrested. We think that at this moment Davis's liberty was fully restricted as it was minutes later when the Customs officer formally arrested him."
>
> Id. at 352

Needless to state, the situation in Davis is clearly analagous with the case sub judice, where, after stopping Murphy's vehicle, he was thereupon directed to drive the same back to the Roan Lane residence, where, for all intents and purposes, he was placed in custody and subsequently formally arrested.

Similarly, in *United States v Ward*, 488 F 2d 162 (1973) the Ninth Circuit Court of Appeals sought to differentiate between a "street encounter" and a proscribed "seizure" of a person and held:

> "Although not all street encounters between citizens and law enforcement agents involve Fourth Amendment considerations, when an officer accosts an individual and by physical force or show of authority restrains his liberty short of arrest, the stop becomes a "seizure" of the person. *Terry v Ohio*, 392 U.S. 1, 16, 19 n. 16. 88 S.Ct. 1868, 20 L. Ed 2d 889 (1968)."
>
> Id. at 168

The Court went on to hold:

> "Although the Supreme Court has not defined the precise point at which a police encounter becomes subject to Fourth Amendment scrutiny, *Terry v Ohio*, supra, 392 U.S. at 19, n. 16, 88 S. Ct. 1868, it is clear that when four federal agents pull a motorist off the road by use of a siren there has been a seizure eventhough the agents only intended to make a routine investigation. *United States v Nicholas*, 448 F 2d 622 (8th Cir. 1971); *Carpenter v Sigler*, 419 F 2d 169 (8th Cir. 1970); see *United*

States v Mallides, supra. The appellant as a law abiding motorist was forced to respond to the siren (unlike the knock at the door); and despite the fact that the appellant was not formally under arrest when the four agents flashed their badges and surrounded him, his freedom to depart was realistically restrained. *United States v Nicholas*, supra. We find therefore that the FBI's interception of Ward's automobile under these circumstances did constitute a "seizure" which must be examined for reasonableness under the Fourth Amendment."

Id. at 169

Such principles were further considered and indeed, reaffirmed by the Supreme Court in *U.S. v Brignoni-Ponce*, 422 U.S. 880 (1975) where the propriety vel non of a vehicular stop by border patrol agents who sought to determine the alien status of the vehicle's occupants was put in issue.

Although the Court in such instance allowed as an exception, stops occurring "at the border and its functional equivalents" it nevertheless reaffirmed the constitutional requirements relating to other type situations which make requisite knowledge of "specific articulable facts" that reasonably warrant suspicion of illegality. As to such situations, the Supreme Court continued to adhere to the constitutional mandates of the Fourth Amendment, viz:

"The Fourth Amendment applies to all seizures of the person, including siezures that involve only a brief detention short of traditional

> arrest. *Davis v Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed 2d 676 (1969); *Terry v Ohio*, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 1877, 20 L. Ed 2d 889 (1968). "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person" id, at 16, 88 St.Ct. at 1877 and the Fourth Amendment requires that the seizure be "reasonable"."

Ergo, and in applying such well-defined and exacting constitutional mandate to the case sub judice, it is clear that neither at the time Murphy's vehicle was originally stopped on the roadway, nor when he subsequently parked the same at the Roan Lane residence (where he was directed to drive) was there any semblance of probable cause or articulable facts to justify the clear "seizure" of not only Murphy's vehicle but indeed, Murphy as well.

> 1962, 312 F 2d 632, cert. denied 372 U.S. 953, 83 S. Ct. 952, 9 L. Ed. 2d 978; *Hobson v United States*, 8th Cir. 1955, 226 F 2d 890."

As noted, all evidence of marijuana and other items of evidentiary matter which were obtained at, upon or near the 129 Roan Lane residence, *including* that which was recovered from the several vehicles located thereon were well within the curtilege of such residential private property.

Undeniably, it was not until *after* the agents' totally unauthorized and warrantless entry into such proscribed area that the presence of marijuana was either ascertained or otherwise detected.

In *Fixel* (supra) the Fifth Circuit Court of Appeals considered a similar intrusion on one's private property and determined as follows:

> "The sacredness of a person's home and his right of personal privacy and individuality are paramount considerations in our country and are specifically protected by he Fourth Amendment. The Fourth Amendment's protection, however, extends further than just the walls of the physical structure of the home itself. The area immediately surrounding and closely related to the dwelling is also entitled to the Fourth Amendment's protection. In defining the surrounding area entitled to such protection, the courts historically have found helpful the common law concept of "curtilage", meaning "yard, courtyard or other piece of ground included within the fence surrounding a dwelling house". *Marullo v United States*, 328 F 2nd 361, 363 (5th Cir. 1964), quoting Webster's Third New International Dictionary (1962). See *United States v Molkenbur*, 430 F 2d §63, §66 (5th Cir., 1970); *United States v Davis*, 423 F 2d 974, 977-978 (5th Cir., 1970); *United States ex rel Boyance v Myers*, 398 F 2d 896, 899 (3rd Cir., 1968); *United States v Mullin*, 329 F 2d 295, 298 (4th Cir., 1964); *When officers have physically invaded this protected area either to seize evidence or to obtain a view of illegal activities, we have readily condemned such an invastion as violative of the Fourth Amendment. United States v. David*, supra, 423 F 2d at 977; *Texas v Gonzales*, 388 F 2d 145, 147-148 (5th Cir., 1968); *Brock v U.S.*,

223 F 2d 681, 685 (5th Cir., 1955); see *Gil v Beto*, 440 F 2d 666, 667 (5th Cir., 1971)."

"Applying these traditional property concepts to the instant case, we are convinced that Fixel's constitutional right has been violated. Although the record is unclear whether Knapp was physically encroaching on a constitutionally protected area when he made his initial observations, *it is absolutely clear that Knapp unlawfully encroached on a protected area when he actually entered the backyard, seized the black shaving kit and searched it. Regardless of how "suspicious" the agents were that contraband was located on the premises, this fact alone does not justify a search of Petitioner's premises in the absence of a search warrant."*

(emphasis supplied)

Clearly, the government cannot justify its warrantless arrest and search upon the fruits of its proscribed and unlawful acts. *Potter v U.S.* 362 F2d 493. (CCA 5th, 1966) where the Court held:

"In deciding the issue we must consider the totality of circumstances as the officer perceived them up to the moment he commenced the search. We cannot consider any evidence he may have discovered thereafter. A search is not to be made legal by what turns up after the search is begun. It is good or bad when it starts, regardless of ultimate success. *United States v Di Re;* 332 U.S. 581, 68 S.Ct. 222m 92

L. Ed 210 (1948) *Clay v U.S.* 5th Cir., 1956, 239 F 2d 196."

Ergo, in order to justify the unconstitutional intrusion reflected in the case at bar, and the consequent arrest of the Defendants herein, probable cause must have existed at the moment of entry and/or arrest. *United States v Moore*, (CCA 9th, 1973), 483 F 2d 1461, *Potter v U.S.* (supra), and *U.S. v Calovich*, (D.C. Mo. 1975) 392 F. Supp 52.

The Court in *Moore*, considered the necessity of probable cause and held as follows:

> "Probable cause at the time of arrest is determined by examining 'whether *at that moment* the facts and circumstances within . . . (the agents') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense' " *United States v Selby*, 407 F 2d 241, 242-243 (9th Cir. 1969) quoting *Beck v Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) *Suspicious conduct is not enough.* See e.g. *Henry v U.S.* 361 U.S. 98, 101, 80 S. Ct 168, 4 L. Ed. 2s 134 (1959) *Probable cause is lacking if the circumstances relied on are "susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities." U.S. v Kandlis*, 432 F 2d 132, 136, (9th Cir. 1970) quoting *U.S. v Selby*, supra, 407 F 2d 243."
>
> (emphasis supplied).

Nor can the government herein take either refuge or solace from any erstwhile delay on the part of the agents in not entering the premises until *after* Murphy's forced and *"custodial"* type return thereto.

The principle in this regard was appropriately considered in *Vale v. Louisiana*, 90 S.Ct. 1969 (1970) where the Supreme Court held in such instance:

> "A search may be incident to an arrest "only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest". *Shipley v California*, 395 U.S. 818, 819, 89 S.Ct. 2053, 23 L. Ed. 2d 732; *Stoner v California*, 376 U.S. 483, 486, 84 S. Ct. 889, 891, 11 L. Ed 2d 856. If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house. cf. *Agenello v U.S.* 269 U.S. 20, 32, 46 S. Ct. 4, 6, 70 L. Ed 145 not somewhere outside—whether two blocks away. *James v Louisiana*, 382 U.S. 36, 86 S. Ct 151, 15 L. Ed. 2d 30, twenty feet away, *Shipley v. California*, supra, or on the sidewalk near the front steps. "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant." *Agnello v U.S.*, supra, 269 U.S. at 33, 46 S. Ct. at 6. That basic rule 'has never been questioned in this Court.' *Stoner v California*, supra, 376 U.S. n 5, 84 S. Ct. at 892."

In *Vale*, officers arrested the Defendant on the "front steps" of his house and thereupon proceeded to enter and search the house itself. Here, Murphy was

effectively under arrest (if not on the roadway where his car was stopped) certainly at the residence where he was ordered to stand still while the agents 'fanned out' and conducted their somewhat intensive search of the house and grounds.

Needless to state, the Supreme Court has repeatedly held that the warrantless detention of an individual such as was demonstrated with respect to Defendant Murphy was both in law and in fact, a seizure. Thus, it was held, in *U.S. v. Mendenhall*, 100 S. Ct. 1870, (1980) as follows:

> "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. See *Terry v Ohio*, supra, 392 U.S. at 19, n 16, 88 S. Ct. at 1879, n 16; *Dunaway v N.Y.* 442 U.S. 200, 207, and n 6, 99 S. Ct 2248, 2253, 60 L. Ed. 2d 824, 3 LaFave, Search and Seizure 53-55 (1978). . ."

Certainly, the fact that Murphy was not told he was under arrest until after the "gleanings" were found

does not alter the de facto "seizure" of his person. *Dunaway v New York*, 442 U.S. 209, 211.

Indeed, any notion that one's Fourth Amendment rights do not apply to inventigatory stages was fully dispelled by the Surpeme Court in *Davis v Mississippi*, 374 U.S. 721 (1969), where such Court specifically mandated:

> "To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions' ".
>
> Id at 726, -727 89 S. Ct. at 1397.

In however, considering the significance of the agents' discovery of the "gleanings" (presumably being marijuana residue), it is imperative to note that the presence of the same was *not* ascertained until *after* the warrantless intrusion upon the Roan Lane residence and the consequent commencement of the search of the premises. Similarly, the purported aroma of marijuana emanating from the storage room was totally undetectable until *after* the agents not only trepassed upon such property, but indeed, had in fact, entered the house and thereupon smelled the same.

Certainly, if either of such matters are to have any efficacy in determining the validity vel non of either the arrest and subsequent seizure of evidentiary matter, it is essential that the same *precede* rather than follow the warrantless entry upon the Roan Lane property.

Since there was no probable cause in the first instance to arrest and no probable cause to search existed prior to the agents' entry into the vicinity where the "gleanings" were found and/or the odor of marijuana could be discerned, it follows that there can be no justification for their having entered that area. The Supreme Court, in *Johnson v United States*, 333 U.S. 10, 16-17 (1948), addressed a similar problem where agents could ascertain only *after* entering the premises that cause existed to believe that the defendant was smoking opium, and held that:

> "the Government os obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects" and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

Albeit, since "a search is not to be made legal by what turns up". *Miller v. U.S.* 357 U.S. 301, 78 S.Ct. 1190, 22 L.Ed.2d 1332; *U.S. v DiRe.*, 332, U.S. 581, 68

S.Ct. 222, "the actual discovery of the contraband cannot be used to support a finding of probable cause. Mere probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant." *Chapman v U.S.* 365 U.S. 610, 81 S.Ct. 776., 52 L.Ed.2d 828, *Jones v. U.S.* 357 U.S. 493, 78 S.Ct. 1253, 22 L.Ed.2d 1514: *Agnello v U.S.* 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145, *Catalanotte v U.S.* 6th Cir., 208 F.2d 264, C.A. Mich.

In *U.S. v Paroutian*, 299 F.2d 486 C.A.N.Y., the Court said:

> "A showing that the government had sufficient independent information available so that, in the normal course of events, it might have discovered the questioned evidence without an illegal search, cannot excuse the illegality or cure tainted matter."

The Supreme Court in *Henry v US* 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168, otherwise and further rejected as an adequate basis for a warrantless search or arrest "common rumor or report, suspicion or even 'strong reason to suspect.'" The Supreme Court in such case clearly stated

> ". . . while a search without warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search it must be made with probable cause."

In a somewhat analogous situation the 10th Circuit Court of Appeals in *U.S. v Newman*, (10th Cir. 1970)

considered the critical significance of whether "an egg comes before the chicken and determined that the presence of the odor of marijuana" . . .

> ". .has no determinative significance as the odor of marijuana was detected *after* the search was in progress. The odor of the drug did not trigger the search . . ."

Similarly, in *Hurst v People of the State of California*, 211 F.Supp. 387m D.C. Cal; the Court held:

> "I see no legal basis for permitting a search, as incidental to an arrest, to precede that arrest, no matter how appealing the practicalities of the situation might appear."

The Court went on to hold:

> "The law requires . . . that an arrest be made *prior to any search* of the Defendant or *of the area under his possession* or contact, in order that such search be considered as incident to the arrest" *U.S. v Rabinowitz*, 239 U.S. 56, 70 S. Ct. 430.
>
> (emphasis supplied)

Needless to state, the approach utilized by the Government in the case at bar in relying upon the evidence *subsequently* seized, to justify its *prior* entry and seizure of private property, is not only unprecedented, but indeed, incredulous

The requirement for a search warrant was underscored in *Chimel v California*, 395 U.S. 752, 23

L.Ed.2d 685, 89 S.Ct. 2034 where it was held that not withstanding a valid arrest, a warrantless search of premises beyond the area of an accused's immediate control was not justified. The Court in such instance stated:

> "Even in the Agnello case the Court relied upon the rule that 'belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause'. 269 U.S. at 33, 70 L. Ed. at 149, 51 ALR 409. Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking (an)-exemption (from the requirement) to show the need for it. . .' *U.S. v Jeffers*, 342 US 48, 51, 96 L. Ed. 59, 64, 72 S. Ct. 93."

In so determining, the Court reaffirmed its opinion as rendered in *McDonald v U.S.* 335 US 451, 93 L.Ed. 153, S.Ct. 191, wherein it held:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals not to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade the privacy in order to enforce the law. The right of privacy was deemed

> too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative" Id. at 455-459, 93 L. Ed. at 158.

C. Where as in the case sub judice, no exigent circumstances are shown to exist, the warrantless search of the Roan Lane residence cannot be justified nor indeed can the "13th hour (after the fact) issuance of a search warrant make lawful the prior impermissible and unconstitutional search of the residence and grounds.

At the outset, it is significant to note that the Roan Lane residence had purportedly been under continual surveillance and "intense investigation" for more than 10 months prior to their warrantless entry upon such premises November 4, 1981.

Certainly, had probable cause existed prior to such date, or indeed, prior to any actual trespass upon the property, it would have been incumbent upon them to have obtained a valid search warrant *before* their actual entry and search of the premises.

Aside from other considerations, the facts are believed to be undisputed that absolutely no exigent

circumstances were demonstrated before the agents' somewhat massive "invasion" of the subject property.

Indeed, the only additional "factual matter" which was not observed during the preceding 10 months of "intensive investigation" of the premises were two individuals (Murphy and Hartsell) conversing on the porch and drinking from a "green bottle."

Albeit, and in the face of such patent constitutional intrusions it is incredulous that the Government would seek to compound the same by seeking to justify the search and seizure of the Roan Lane residence through the "ex post facto" search warrant purportedly issued in the case at bar.

Indeed, the absurdity of such proposition is deemed to be so gross as to negate any necessity for argument and, in the interest of brevity, the same will be omitted.

Suffice it to say however, that even were we to give serious consideration to any legal efficacy of such "warrant" the fruits thereof would necessarily still have to be supressed in any event, since the underlying affidavit is, per se, wholly insufficient to establish the requisite probable cause to support its issuance.

CONCLUSION

For the reasons and upon the authorities as hereinabove set forth, the defendants Murphy and Hartsell submit that the within Motion should be granted and that all items as encompassed in Section I hereof, should be suppressed as evidence.

Respectfully submitted

Louis Vernell, Esquire
420 Lincoln Road
Miami Beach, Florida 33139

and

Wayne D. Mancuso, Esquire
850 South Clearview Parkway
Suite 100
New Orleans, Louisiana

Attorneys for Defendants
Murphy and Hartsell

IT IS HEREBY CERTIFIED that a true copy of the foregoing Motion to Suppress was hand delivered to the Hon. Howat Peters, Ass't U.S. Attorney, and furnished to all counsel of record.

LOUIS VERNELL, ESQUIRE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CRIMINAL DOCKET 81-400

UNITED STATES OF AMERICA

v

JAMES MURPHY, JOHN HARTSELL
GARY MERRIT, et al

Defendants

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTIONS(S) TO SUPPRESS OF DEFENDANTS MURPHY, HARTSELL and MERRIT

With leave of Court first had and obtained, the Defendants JAMES MURPHY, JOHN HARTSELL and GARY MERRIT respectfully submit the within Supplemental Memorandum in support of their Motion(s) to Suppress as heretofore filed in the within cause.

At the outset, it is submitted that the facts and evidence as adduced at hearing(s) conducted in the cause on April 29 and 30, 1982, convincingly demonstrate the gross and impermissible constitutional violations as heretofore claimed by the within Defendants. Albeit, and inasmuch as the constitutional challenges as asserted are addressed to separate, but however mutually related events and circumstances, the same will be considered in their respective chronological order, viz:

I. PREFATORY FACTS AND CIRCUMSTANCES:

The undisputed evidence adduced at the Suppression hearing reflected that the entire investigation and all subsequent searches and consequent seizures stemmed from information purportedly received by Lieut. Russell Milan from certain of his "investigators in the field". T99.[1]

Essentially, the information as related, concerned a report that marijuana was being brought in by a vessel "somewhere along the southeastern coast of Louisiana", which the Lieut. defined to encompass an area "from LaFitte to the Mississippi State line" (T 48)

When queried as to the source and/or reliability of such information, the Lt. candidly admitted that "the information was received from agents who supposedly got it from other agents" and that no factual basis or source for such information could be provided (T 101).

Albeit, and "without knowing how reliable the information was or what the source of the information was" (T 101), the Lt. "initiated an investigation into any possible smuggling activity in the southeastern area of Louisiana". (T 111) As an incident thereto, the Lt. directed his agents to look for suspect type vehicles which he defined to include vans, trucks, cars, 18-wheelers, rental cars and virtually every type of moving vehicle. (T 102). Similarly, the Lt. directed his agents to look for boats measuring possibly "24 feet up" in length (T 103). Except for such generalized descriptions, the search was not

---

Note: The letter 'T' denotes reference to the transcript of proceedings conducted herein on April 29 and 30, 1982.

directed to any other features relating to either the car or the boat involved.

In the course of subsequent search, agents observed a jeep and a trailered Roballo boat at the Ramada Inn Motel located in Slidell, Louisiana. The jeep and boat were later seen to depart from such motel and taken to a recreational area in Fort Pike where the Roballo was launched at approximately 5 o'clock P.M. on November 3, 1981. The Lt. thereupon contacted and obtained the assistance of the St. Tammany Parish Sheriff's Office, which dispatched a marine patrol unit to the Slidell area which arrived at approximately 6 o'clock P.M.

Although Captain William H. Dobson, Jr., who was in charge of such marine unit, was directed to look for the Roballo boat, he remained on shore for approximately five hours (from 6:30 P.M. until 11:30 P.M.) before launching his boat (T 150). Within ten to fifteen minutes thereafter, the Captain received information that the Roballo had returned to its original launch site at Fort Pike (T 152, 198).

Albeit, and after receiving such information, Captain Dobson was then instructed to proceed into Lake Ponchartrain "to see if he could find a larger vessel" (T 152), whereupon the vessel Forty was subsequently observed, viz:

II. THE STOPPING, SEARCHING AND CONSEQUENT SEIZURE OF THE VESSEL FORTY

In Complying with the instruction of Lt. Milan, Captain Dobson proceeded to Lake Ponchartrain "to find a larger vessel" (T 152). Albeit and except for the

requirement that it should be "bigger than the Roballo" no other description was provided (T 199).

After entering the Lake and proceeding a short distance, Captain Dobson "spotted a large vessel at the entrance of Salt Bayou (T 152). The Captain reported such observation and he was thereupon instructed to stop the boat. Significantly, such decision to stop the boat was made solely by the Lt. who remained on shore (T 181) and except for his specific direction, Captain Dobson testified he would not otherwise have stopped the vessel (the Forty) (T 200).

Captain Dobson further testified that he complied with Lt. Milan's specific instructions that he identify the boat and the occupants on board (T 153) and relayed such information to the Lt.

Although at his request, the Captain of the Forty (Arthur DesRoches) produced documents (T 103), the Lt. nonetheless instructed Captain Dobson to have the vessel Forty brought to shore "for a documentation check" (T 202). Captain Dobson conceded that such documentation check could have been made on the Lake without the necessity of bringing the boat into shore (T 202, 203).

Pursuant to instructions received from Lt. Milan, Captain Dobson then directed that the vessel Forty be brought into the Harbor Inn Marina, a/k/a Gahagan's Landing.

Albeit, at no time did Captail Dobson observe any proscribed or unlawful activity aboard the vessel Forty, notwithstanding that for a period of time, his boat was

tied up alongside such vessel. (T 154). Indeed, the Captain conceded that were it not for the specific instructions of the Lt. he would not have directed that the vessel Forty follow him to shore, as he was personally unaware of any fact or circumstance otherwise necessitating such action (T 200).

In any event, and from the time the vessel Forty was stopped, the evidence was undisputed that such vessel was not free to travel on its way and had it not complied with the Captain's orders, he "would have *made* them come to him". (T 156).

Although Captain Dobson alluded to the absence of a light on the vessel Forty, he nonetheless testified that the same had nothing to do with either his stopping of the vessel or its being ordered into port (T 185).

After arrival at Harbor Inn Marina, Captain Dobson testified that he immediately went aboard and commenced a search of the vessel (T 188). Indeed, the Captain related that he was the first officer aboard the vessel, and he performed a "cursory search" of the same (including the cabin area), even before the arrival of the Customs agents. (T 188). At no time during his presence on the scene, did he advise any of the occupants or crew (Arthur Des Roches, Cori DesRoches and Gary Merrit) of their Miranda rights, although he nonetheless instructed such individuals that they were required to remain until Customs agents arrived (T 204).

With respect to subsequent events occurring at the Marina, Sgt. Stanley Hughes of the Louisiana State Police testified that he arrived with Customs Agent Waldner approximately one hour after the vessel Forty

had been brought in, i.e., 1 A.M. (T 259). Upon his arrival, the Sgt. observed that the St. Tammany Sheriff's deputies were holding and otherwise detaining Merrit and the DesRoches brothers (T 301, 321). When queried as to whether the officer(s) watching such individuals had weapons, Sgt. Hughes responded, "probably a shot gun" (T 323). The Sgt. conceded that he had no warrant to search the vessel and he relied upon the authority of the United States Customs to seize the vessel as authority for his subsequent search (T 318).

Albeit, and within minutes after his arrival, Sgt. Hughes gave Miranda rights to all three individuals (Merritt and Cori and Arthur DesRoches (T 305, 306), and as evidenced, none of such individuals were at liberty to depart, but, to the contrary, were required to remain where positioned (T 206).

During the Sgt's subsequent search of the vessel, he testified that he observed and retrieved marijuana gleanings "in the living quarters, in the cabin area, the kitchen area, the hold, deck, and fore and aft sections (T 330). In all, the gleanings collected by the Sgt. amounted to possibly a quarter of an ounce (T 331). Despite the alleged presence of such marijuana, and the purported seizure of the vessel Forty by Customs agents, none of the crew were arrested until approximately 5 A.M., after being held at the Marina for over four hours (T 373, 374).

Admittedly, during such period of detention, request(s) by one or more of the crew to speak with an attorney, were ignored. (T 306). Indeed, it was not until Defendant Merrit had arrived at the Slidell County Jail that he was first given a Waiver of Rights Form and

thereupon "arrested", more than five hours after his original detention at the Marina (T 442).

Significantly, at the same time that Sgt. Hughes purportedly made his search of the vessel and found marijuana gleanings in various portions of the boat, Sgt. Lynn Bertaut of the Louisiana State Police was also present, likewise arriving at approximately 1 A.M. (T 437).

In accordingly testifying as to the erstwhile presence of marijuana, Sgt. Bertaut stated that he heard somebody say "there is nothing on board" and in response to his specific queries, agents aboard the vessel told him "they didn't have anything on it" (T 444).

Albeit, and aside from the foregoing undisputed facts, the evidence adduced at the Suppression hearing(s) further demonstrated:

1. At no time was any proscribed or unlawful activity observed with respect to the Roballa from the time it was launched from Fort Pike until its subsequent return.

2. At no time was any contact made between such Roballa and the vessel Forty and, to the contrary, Captain Dobson testified that to his knowledge, there was none. (T 199).

3. Prior to Captain Dobson's approach and stopping of the vessel Forty, neither he nor Lt. Milan had any knowledge or information concerning such vessel (T 59, 63); nor where it had come from or how long it had been

on the Lake, i.e., whether days, weeks, months (T 106, 107).

4. That when Lt. Milan ordered that the vessel Forty be stopped, his only reason(s) therefor was that "it was a converted crew boat into a pleasure boat and it could *possibly* be a load boat (T 108).

5. At no time was the presence of marijuana and/or the odor of marijuana ever discerned aboard the vessel Forty from the time it was first observed and stopped by Captain Dobson until it was ultimately brought to the Harbor Inn Marina, nor was any illegal or proscribed act or activity otherwise observed on or aboard such vessel during such period of time.

Needless to state, the foregoing uncontroverted facts are submitted as being patently sufficient to convincingly demonstrate the constitutionally intrusive and indeed, offensive procedures utilized in connection with the stopping, seizure and search of the vessel Forty and the consequent arrest of the Defendant Merrit and Co-Defendants, Arthur and Cori DesRoches.

Certainly, the facts in the case sub judice are far less incriminatory than those recently considered by the Fifth Circuit Court of Appeals in the almost factually identical case of *United States v Villamonte-Marquez*, 652 F. 2d 481 (1981) where such Court decisively held:

> "In the case before us, the government can point to nothing which could have affirmatively suggested a law violation to the officers. From the "articulable facts" known to the officers at the time of the boarding, a

reasonable suspicion of a law violation could not rationably be inferred. The facts could support nothing more than a generalized suspicion and speculation in the minds of the officers. Therefore, the search and seizure of the vessel and its cargo was not reasonable under the Fourth Amendment. We hold that the court erred in denying defendants' motion to suppress. The decision of the District Court is reversed."

Id at 488

III. THE STOPPING, DETENTION AND ARREST OF DEFENDANT MURPHY

With respect to the Defendant Murphy, the evidence was undisputed that prior to the morning of November 4, 1981, he was totally unknown to any law enforcement agent and indeed, he had never, prior to such date, been seen or observed in connection with the case sub judice (T 115).

Albeit, and on such date, agents purportedly saw him entering and leaving the residential premises described as 129 Roan Lane, La Combe, Louisiana. As evidenced, such address was initially brought to the attention of the agents through their checking of telephone calls charged to rooms occupied by the Co-Defendants Merrill and McGill at the Ramada Inn in Slidell.

After determining the site of such resident, Lt. Milan testified that he made the decision "to proceed to that address and interview the occupants of the address *to see what determination we can make from*

there" (T 29) As an incident thereto, Lt. Milan immediately placed such property under surveillance. (T 30).

Shortly thereafter, the Lt. joined his surveillance team at such residence and obtained "an advantage point" to better observe activities upon the property (T 30).

From his observation post, the Lt. observed Defendant Murphy and Defendant Hartsell (who was likewise previously unknown to any agent in the case sub judice) "standing up on the outside porch drinking Heinikin beer together" (T 31). Shortly thereafter Murphy left the residence and proceeded out toward the highway, whereupon the Lt. "gave instructions that he be stopped." (T 31).

On cross examination, the Lt. conceded that before he had ordered Murphy's vehicle to be stopped, the *only* facts known or observed by the Lt. relating to Murphy, was:

(1) that "he was on the porch area drinking from a green bottle, Heinikin beer" and

(2) that he had also "been observed going into and from that residence on three different occasions" (T 119).

Although at such time the Lt. had no knowledge that there was, in fact, any marijuana present or concealed on the Roan Lane premises (T 127), he nonetheless ordered that Defendant Murphy be arrested and brought back to the Roan Lane address (T 126). Significantly, at no time prior to such arrest did either the Lt. nor any

other agent see Defendant Murphy commit any unlawful act. (T 127).

When he was, however, pressed to disclose any unknown unlawful activity on the part of Murphy at the time his car was stopped, the Lt. could only allude to the fact that Murphy "was patronizing and freely moving about an area that we *suspected* that contained a quantity of marijuana." (T 116).

Notwithstanding such illusory rationale, the Lt. nonetheless conceded that the Roan Lane premises had been under continuous surveillance and investigation by at least three law enforcement agencies for the preceding ten months (T 117), and that during such entire period, no illegal activity was ever observed on the property (T 117, 118). Albeit, and except for "suspicion", the Lt. openly admitted that prior to November 4, 1981, he "had no probable cause to believe there was any illegal activity taking place on the Roan Lane premises" (T 118).

Certainly, and as noted by the Fifth Circuit in *United States v Almas*, 507 F 2d 65 (1975), the mere presence of an individual at and/or near the scene of unlawful activity is not sufficient to either authorize or justify a vehicular stop.

Similarly, in *United States v Cole*, 608 F 2d 897 (1980) the Fifth Circuit determined:

> "The officer's pat-down of appellant cannot be justified by appellant's mere presence on the premises during the execution of the warrant. A person's mere propinquity to others

> independently suspected of criminal activity does not, without more, give rise to probable cause to search that person . . . Mere presence neither obviates nor satisfies the requirement of *Terry v Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed 2d 889 (1968)."

To the same effect, the innumerable authorities as referred to in the Defendant's earlier Memorandum convincingly demonstrate the total impropriety and flagrant constitutional violations attendant to the stopping of Murphy's vehicle and his consequent arrest, i.e., *U.S. v Davusm* (D.C.E.D.La. 1971), 328 F.Supp. 350; *U.S. v Ward* 488 F 2d 162 (1973); *Delaware v Prouse*, 440 U.S. 648 (1948); *U.S. v Brignoni-Ponce*, 422 U.S. 880 (1975).

Albeit, and following such warrantless and totally unlawful stopping of Murphy's vehicle and his consequent detention and defacto arrest, he was thereupon brought back to the Roan Lane residence where even more extraordinary and otherwise constitutionally impermissible events occurred, viz:

IV. THE WARRANTLESS ENTRY AND SEARCH OF THE 129 ROAN LANE RESIDENCE, ABSENT BOTH EXIGENT CIRCUMSTANCES AND/OR PROBABLE CAUSE.

As noted, Lt. Milan's testimony with respect to when and where the arrest of Murphy was, in fact, effected, was totally inconsistent and otherwise contradictory, e.g., —at first he unequivocably testified that, at his direction, Murphy had been arrested *on the street*, after his vehicle was stopped, and *thereafter*, he was brought back to the Roan Lane residence (T 126).

Less than four transcript pages later (T 130), the Lt. denied ever stating Murphy was arrested on the street. To the contrary he testified that Murphy was simply "detained" before being brought back to the residence where his arrest followed. As noted, for all practical purposes, such dramatic change in testimony was in reality, a distinction without difference, since the Lt. further testified that Murphy's "detention" was nonetheless sufficient to preclude him from leaving (T 131).

Albeit, and in either event, when Murphy was, in fact, brought back to such residential property, numerous law enforcement vehicles (approximately eight) and a substantial number of agents, (approximately twelve) converged on the property (T 131).

Upon entering the property, the Lt. and other agents immediately confronted Defendant Hartsell in the carporte where, after questioning him as to his residence and control of the property, the Lt. immediately had one of his agents read Hartsell his rights. — (T

Shortly thereafter, and *prior* to Hartsell's arrest, agents observed the presence of marijuana gleanings in the area, whereupon Hartsell was *then* arrested (T 134).

As noted, because of its critical importance, concerted effort was made to determine exactly when and where the presence of marijuana on the property was first detected.

In this regard, Lt. Milan unequivocably testified that it was not until after he had actually entered upon

the premises that marijuana gleanings were first observed (T 125). Indeed, the gleanings found on the ground and on the parked truck could not even be seen "unless you were physically *standing right next to it*" (T 129). Additionally, *until you were physically on the property*, you couldn't otherwise smell any marijuana (T 129).

Similarly, it was only later, following the arrest of both Murphy and Hartsell, that either either the Lt. or his agents detected the odor of marijuana emanating from the side addition to the residence where a quantity of marijuana (approximately 1500 pounds) was subsequently found (T 34).

Incredibly, it was not until six to eight hours *after* such warrantless entry upon the Roan Lane property that a search warrant was issued at 5:19 P.M. by a State Court Judge.

Albeit, and during such interval, Hartsell was required to remain handcuffed on the property while the agents freely entered, searched and indeed, "made themselves at home" in both the interior as well as the exterior and adjoining areas of the property.

Indeed, photos received in evidence demonstrated that *prior* to the issuance of the search warrant, the agents had not only photographed practically every interior area of the building, but had even photographed a scene reflecting the presence of at least sixteen agents at one time, with another photo showing the additional presence of at least eight police vehicles surrounding the property. Incredibly, one of the photos received in evidence actually depicted an agent comfortably seated

in the living room doing "clerical work" – hours before the search warrant was finally obtained.

When queried as to whether Hartsell had consented to a search of the premises, Lt. Milan testified, *"He did not give a consent to search, and we did not request a consent to search"*. T (138)

Finally, and to totally dispel the existence of any possible exigent circumstances to justify such warrantless entry and search of the premises, Lt. Milan testified as follows:

"Q Now, the house and premises were pretty well covered, you might say, to use the expression, is that right, sir?

A In what manner, sir?

Q I mean, you had cars that were available to stop anybody going to or from the premises, you had the situation area pretty much under control at that time, is that right, sir?

A Yes, I believe so.

Q Nobody could have gone any place, or gone into the place unless you said Okay, isn't that right, sir?

A Unless it was by boat.

Q And even then, you had pretty much control of that situation with your radios or whatever, to take necessary action, is that right, sir?

A Yes, sir. We had pretty well control of the situation."

Indeed, and to avoid any ambiguity and/or doubt in the matter, Lt. Milan concluded his cross-examination with the following question and answer:

"Q . . . Sir, with all of the array of officers that you had around there, the eight or ten cars, the twelve-plus number of agents, if you wanted to secure the premises until the search warrant was issued, couldn't you have done so from across the street, or without going on the premises?

A I suppose so, sir."

Needless to state, in applying the almost overwhelming weight of constitutional authority to the foregoing facts, there neither can nor should be any question but that the agents' entry, search and consequent seizure of evidence from the Roan Lane property was constitutionally impermissible. Ergo, and for the reasons and upon the authorities as contained in the prior Memorandum submitted by Defendants Murphy and Hartsell, all evidence and statements derived therefrom should necessarily be suppressed.

V. THE "THIRTEENTH HOUR/AFTER THE FACT" OBTAINMENT OF A SEARCH WARRANT RE: THE RESIDENTIAL PROPERTY LOCATED AT 129 ROAN LANE, LA COMBE, LOUISIANA

Incredibly, and although a search warrant was not issued to search the subject residence until 5:19 P.M., the decision to obtain such a warrant was made almost *eight hours before* such event.

In this regard, Sgt. Stanley Hughes (who prepared the underlying affidavit), testified that such determination to obtain a warrant was made at approximately 9:00 A.M., after consultation with Lt. Milan and other officers (T 339). Yet, and even more remarkable than the inordinate delay in obtaining such warrant (after the entry and search had already been completed), is the fact that the only facts which were *then* known to support such decision and the issuance of a search warrant were: (1) "that that particular area *could possibly* be used for marijuana smuggling," and (2) the record of the calls from the Ramada Inn to such residence (T 342, 343).

Needless to state, such facts fall far short of the essential requirement necessary to establish probable cause for the issuance of a search warrant. It is accordingly of little wonder that *after* such determination was made, Sgt. Hughes "supplemented" the factual basis in his affidavit by including therein facts and circumstances *occurring on the property after the agents had made their warrantless entry and search of the premises* (see affidavit for search warrant executed by Sgt. Hughes).

Needless to state, when Sgt. Hughes presented his application to the State Court Judge, he omitted any mention that the agents had already been in the house (T 372).

Indeed, and with respect to such affidavit, even Sgt. Hughes testified that the same was erroneous in certain material respects, e.

(1) That the vessel "Forty" had been boarded by the Sheriff's deputies after being stopped on Lake Ponchartrain (no such boarding took place).

(2) That the three individuals on board had been arrested after such boarding by the Sheriff's deputies (no such arrest took place).

(3) That the vessel which was expected was coming "from outside the continental United States", when neither he nor any other agent knew where such vessel was coming from. (T 345).

Albeit, and aside from other glaring errors and unconsistencies in Sgt. Hughes' "probable cause" affidavit, it is patently obvious that neither such affidavit nor the consequent search warrant which was subsequently issued, could possibly serve to either authorize or condone the agents' prior unlawful and constitutionally impermissible entry and search of the premises.

V. APPLICABLE LAW AND "STANDING"

During proceedings upon the various Motions to Suppress as filed in the within cause, the government stipulated and otherwise conceded the privacy interest and "standing" of each of the within defendants to challenge their respective arrests and the consequent searches and seizures of all evidence and statements resulting therefrom, save and except with respect to the "hold" areas of the vessel "Forty".

As noted, however, such exception is wholly without relevance and/or materiality since the undisputed evidence demonstrated that even prior to the discovery of any marijuana *particles* in the hold area, the boarding agents at the Harbor Inn Marina had already observed other marijuana particles in the cabin, crew quarters or the deck, etc., upon which the seizure of the vessel and arrests of the defendants were predicated.

Ergo, the fact that a somewhat miniscule amount of particles were located in the hold area (the exact amount never having been disclosed, but merely placed with other particles in a paper cup), could not possibly serve to affect, authorize, or otherwise condone either the threshold violation relating to the initial stopping of the vessel or the subsequent warrantless "seizure" of the vessel on the Lake, or the consequent search thereof at the Marina.

Albeit, and in the interest of brevity, the within defendants would respectfully adopt all legal arguments and Memoranda filed either by Defendants herein or the Co-defendants herein to the extent that the same

may be applicable to Defendants' respective Motions to Suppress.

Respectfully Submitted,

LOUIS VERNELL, Esquire
420 Lincoln Road
Miami Beach, Florida 33139

and

WAYNE D. MANCUSO, Esquire
850 S. Clearview Parkway,
Suite 100
New Orleans, Louisiana
Attorneys for
Murphy, Hartsell and Merrit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CRIMINAL ACTION

SECTION "B"

CASE NO. 81-400

UNITED STATES OF AMERICA

v

GARY MERRITT, et al

Defendants

MOTION AND RENEWED MOTION FOR JUDGMENT OF ACQUITAL OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

I. INTRODUCTION.

As reflected in the record, this Honorable Court reserved decision on the Motion for Judgment of Acquital made on behalf of the within Defendant following the close of the Government's case, and the additional Renewed Motion for Judgment of Acquital as made on behalf of the within Defendant at the close of all the evidence in the cause. Accordingly, and with respect to such prior pending motions, the Defendant does hereby pursuant to Rule 29(b)F.R.cr.P., renew each of the same.

Albeit, and in consequence of the Jury's subsequent verdict of quilt as to each Count of the indictment, the

Defendant hereby additionally moves for a Judgment of Acquital notwithstanding Verdict, in accordance with Rule 29(c) F.R.Cr.P.

Alternatively, Defendant respectfully moves this Honorable Court to grant a new trial, pursuant to Rule 44 F.R.Cr.P.

In accordingly considering the propriety vel non of the within motion(s), the Court is respectfully directed to the following salient facts which are submitted as being dispositive of the issues herein, viz:

II. THE INSUFFICIENCY OF THE EVIDENCE

It is undisputed that the singular presence and appearance of Defendant Merritt in the within cause, and indeed, his *sole* participation in *any* proscribed act or activity relates to his erstwhile presence aboard the Vessel FORTY while the same was purportedly on the waters of Lake Ponchartrain.

Significantly, and with *that* singular exception, the trial proceedings are otherwise barren of any evidence whatsoever relating to any other act or conduct on his part which could possibly sustain Merrit's conviction on any of the crimes charges herein. Yet, and as noted, even such sine qua non factual matter was *not* evidenced at trial, viz:

In accordingly considering the trial proceedings, per se, the Court is reminded of the following essential facts:

1. *Not a single witness identified Defendant Merritt as having been aboard the Vessel FORTY while the same was on Lake Ponchartrain.* In this regard, the only witness produced by the Government who is alleged to have had any contact with the Vessel FORTY before its arrival at the Harbor Inn Marina, was Sgt. Griffin of the St. Tammany Sheriff's Office (notwithstanding that two other Sheriffs' deputies were on the same patrol boat, one of whom was Captain Dobson, who testified at the Suppression hearing). Despite conserted effort by the Prosecutor, the trial transcript affirmatively demonstrates that *Sgt. Griffin was totally unable to identify Merritt in the Court Room as having been aboard the Vessel FORTY.* Coincidently, such witness readily identified Cori and Arthur DesRoches as having been aboard the Vessel while on the lake.

Similarly, and although other agents testified that they had seen and/or observed Defendant Merritt at the Marina, all such observations were made by them only *after* the Vessel had been docked. Albeit, the record convincingly demostrates that there was *no witness* who, in fact, was able to place or identify Defendant Merritt aboard the FORTY *before* its arrival at the Marina.

Undeniably, without competent proof that Merritt was, in fact, aboard the Vessel *before* its arrival at the Marina, there is no possible way that the Government could be said to have sustained the burden of its proof as to any of the four Counts in the indictment.

Certainly such patent deficiency would necessarily negate any of the critical inferences which the Government

would have had to rely upon to suport the various charges made.

Needless to state, in considering the sufficiency of the evidence presented, this court is committed to follow the firmly-established principles as set forth in *United States v DeJean*, 613 F.2d 1356, 1358-9 (5th Cir. 1980):

> "*We must determine whether jurors could reasonably conclude that the evidence is inconsistent with every reasonable hypothesis of innocence. U.S. v Wieschenberg*, supra, (604 F. 2d 326 (5th Cir. 1979); (citations ommitted) Stated another way, the test is whether a reasonably minded jury must have had a reasonable doubt. The test for review of the sufficiency of circumstantial evidence is the same as that for review of direct evidence. *U.S. v Barrera*, supra,"
>
> Emphasis added

Such principles were otherwise stated in *United States v Stephenson*. (5th Cir. 1973) 474 F.2d 1353., as follows:

> ". . . In other words, a motion of acquital *must* be granted when the evidence, viewed in the light most favorable to the Government, is such that a reasonably minded jury *must* have a reasonable doubt as to the existence of any of the essential elements of the crime charged. See *United States v Bethea*. D. C. Cir. 1970, 442 F 2d 790, 792. . . . "

In *Stephenson*, as in the case sub judice the Defendant was determined to be in close proximity to the area where heroin was found. As noted, the Defendant in such case, was seated in a bar adjoining a storage room in which envelopes of heroin were found under a mattress. Significantly, such envelopes bore the fingerprints of the Defendant. Notwithstanding, the Fifth Circuit Court of Appeals applied the foregoing principles and reversed Stephenson's convictions on a 3-Count indictment, stating:

> " . . . However, whatever the nature of the evidence, it must be such that a jury may reasonably infer that the person charged with constructive possession had dominion and control over the drug. *United States v Mendoza*, 5 Cir. 1970, 433 F 2d 891. By the same token, mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession. . . "

In *United States v Butler*, (5th Cir., 1980) 615 F.2d 685, an almost identical situation was considered by the Fifth Circuit Court of Appeals. In such case, the Defendant Butler argued that because he was arrested on the dock rather than on the shrimp boat, there was insufficient evidence to sustain his conviction. The conviction was however, affirmed, singularly because the Court determined that Butler's "personal belongings, including a prescription drug bottle, were found on the boat. *That* connects him to the instrumentality which a jury could well infer brought the marijuana to the Plantation . . . "

As noted, the Court's affirmance was based solely upon its finding of a nexus between Butler's personal property on the boat and his presence on the dock. In the case sub judice, no such nexus, nor indeed any other connection, was established by the evidence adduced at trial.

The Fifth Circuit otherwise emphasized the critical importance of establishing such critical "nexus" in *Connolly v Papachristid Shipping, Ltd.* 504 F.2d 917. (5th Cir. 1974). viz:

> ". . . In other words, there must be *some* nexus between the accused and the prohibited substance. Proof of physical proximity to controlled drugs is not sufficient to establish either actual or constructive possession. As this court has consistently observed 'mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession' . . . "

Defendant submits that such "nexus" was never established in the case at bar, nor did the evidence, in any wise, identify or otherwise properly establish that Defendant Merritt was aboard the Vessel FORTY prior to its arrival at the Marina.

2. Assuming argumendo that the Government was, in fact, able to "place" or otherwise identify Merritt as having been aboard the Vessel FORTY before its arrival at the Marina (a fact which is repugnant to the record), nonetheless the evidence otherwise failed to disclose

when or where (if ever) Merritt is supposed to have boarded the Vessel prior to its being stopped on the Lake. The importance of such deficiency in evidence is underscored in the fact that when Sgt. Griffin "searched" the FORTY at the Marina before the arrival of the Customs agents, he neither saw, smelled or otherwise detected the presence of marijuana, notwithstanding that his own inspection was in the *same* areas where traces of/or gleanings were later discovered by other agents.

Indeed, and with respect to the presence vel non of marijuana or "gleanings" aboard the FORTY, even Customs agent Wallner testified that without a flashlight, or his having to "get down on the floor" he would not otherwise have seen the "gleanings". As the record further reflects, despite his concerted efforts to gather such "ominous" evidence he was only able to obtain a "thimblefull" of the gleanings, even with the assistance of the other agents.

Needless to state, if a "nine-year" veteran of the Sheriff's office, thoroughly trained and experienced in narcotics detection and investigation (Sgt. Griffin), was unable to discern the presence of marijuana on the FORTY while he was aboard the Vessel, and, if further, an equally experienced Customs agent, Wallner, was only able to locate a miniscule amount of "gleanings" with the use of special lighting and physical contortions of his body, how then could the Jury possibly find from such "evidence" (excluding every reasonable hypothesis of innocence) that Defendant Merritt knew, saw, or was aware of the presence of marijuana aboard the Vessel. As noted by the Fifth Circuit Court of Appeals in *United States v Duckett*, (5th Cir. 1977) 550 F 2d 1027,

although the facts described therein were indeed suspicious, they were nonetheless susceptible of and "consistent with a variety of explanations". Certainly, and while everything else in the record regarding Merritt consists of speculation and conjecture, we might carry the same a little further and suggest that Merritt might well have boarded the Vessel (if he was in fact, aboard the same) shortly prior to its being stopped on the Lake, or he "hopped" a ride, believing the Vessel was going to Miami, etc.

Significantly, none of the Government's witnesses were able to testify as to how long the FORTY had been on Lake Ponchartrain or where it was going or had come from. Again, and in utilizing principles considered in *Duckett*, supra, the fact that certain food stuffs found aboard the Vessel had been manufactured in either Venezuela or Columbia is likewise "consistent with a variety of explanations". Indeed, if such "evidence" is deemed to be sufficient proof to establish where the FORTY had purportedly come from, then in the same context, the entire male population of the United States could well be accused of treasonous acts, consorting with the enemy, etc., simply because of having owned a razor (made in Japan) at the time of Pearl Harbor.

Needless to state, the law does not permit such absurdities nor does it allow the Jury to base its verdict upon speculation, surmise or suspicion. Albeit, in the case sub judice, *no single fact* was evidenced in the record which could possibly form the genises for Defendant's conviction on *any* of the four Counts contained in the record.

3. Aside from the absence of any of the foregoing facts which are deemed to be critical to the Government's prosecution with respect to Counts I and II (Conspiracy to import and importation), there is otherwise barren in the record any evidence whatsoever to support Merritt's conviction with respect to Counts III and IV (Conspiracy to Possess and Possession). In this regard there was again no "nexus" between Merritt's alleged presence on the boat and the cache of marijuana later found on the Roan Lane property. (Note: while conceding the Government's attempts to tie in the FORTY with such residence through the medium of the tire marks, it is submitted that there is, in fact, no lawful evidentiary basis to support such premise, infra).

In *United States v Cadena*, (5th Cir. 1978) 585 F 2d k252. . the Fifth Circuit Court of Appeals reversed a boat captain's conviction for conspiracy to distribute marijuana (while sustaining his conviction for importation) where the evidence failed to demonstrate his awareness of, or participation in, plans to distribute the marijuana which he was found to have imported, notwithstanding the underlying rationale that

> ". . . Although a conspiracy to import facilitates a conspiracy to distribute, one cannot joint a conspiracy, whether by conduct or verbal accord, unless one knows that it has in fact, been concocted . . ."
>
> * * *
>
> "Because there was insufficient evidence to sustain Caden's conviction on Count II, that

count of the indictment must be dismissed with respect to him."

PREJUDICIAL ERROR(S)— DENIAL OF DUE PROCESS

The record demonstrates the occurrence of material and prejudicial errors during the conduct of trial proceedings sufficient, per se, to deny to the Defendant Merritt, his fundamental and constitutional right of due process, viz:

A. The Court erred in receiving into evidence the Post-Arrest statements of certain of the Co-Defendants charged in the indictment. In this regard, Defendant Merritt submits the following as constituting the existing and controlling law in the United States, Fifth Circuit, viz:

> "It is well established that an out-of-court statement of one conspirator is admissible against his fellow conspirator if made (1) during the course of the conspiracy and (2) in furtherance of any of its objects. Krulewitch v United States, 336 U.S. 440, 69 S. Ct. 716, 98 L. Ed. 790 (1959). But it is equally well settled that in federal conspiracy trials a statement made during a subsequent period when the conspirators were engaged in nothing more than concealment of the crime cannot come in under the exception to the hearsay rule. Dutton v Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970). Also, in federal court the requirement that the statement be 'in furtherance of' the conspiracy is applied to exclude post-arrest confessions

and admissions which could certainly be of no aid to any continuing enterprise. United States v Hernandez, 441 F 2d 157 (5th Cir. 1971) United States v Harrell, 436 F 2d 606 (5th Cir. 1979)."

U.S. v Register (5th Cir. 1974)
496 F 2d 1072 at 1078

Needness to state, the trial court's admission into evidence of the overwhelming amount of post-arrest statements and acts of the Co-Defendants charged herein, rendered the resulting prejudice to Defendant Merritt irreparable and violative of his due process right, e.g.____

(1) The post-arrest statements of the Co-Defendants Merrill and McGill concerning their fishing activities and presence in the State of Louisiana. Additionally, the post-arrest search of their respective vehicles and the consequent admission into evidence of the AR 180 Rifle and other assorted weapons.

(2) The post-arrest statements of the Co-Defendant Murphy with respect to his alleged alias of "Murray" and the consequent "tie-in" of such name with the title to the Vessel FORTY.

(3) The post-arrest statements of the Co-Defendant Holt with respect to his kinship with the Des Roches brothers and his payment of Merrill and McGill's motel bills.

(4) The post-arrest statements of the Co-Defendants Cori and Arthur Des Roches with respect to their purpose of being on the Lake (diving, salvage, etc.)

(5) The post-arrest statements of the Co-Defendant Hartsell concerning his denials with respect to the marijuana located at the Roan Lane residence.

In accordingly considering that post-arrest statements attributed to *all seven* of the Co-Defendants herein were received into evidence, the consequent prejudice to Defendant Merritt becomes more readily apparent, e.g.

In *United States v Kessler*, 530 F 2d 1246 (5th Cir 1976), the Fifth Circuit Court of Appeals determined it to be not only prejudicial error but prosecutorial misconduct as well to have introduced evidence of a co-conspirator's declarations which were determined not to have been made during the course of, or in furtherance of the conspiracy charged and which, coincidentally formed the basis for the Government's additional introduction into evidence of an AR 180 Rifle (such as introduced in the case sub judice). The Court, in such instance, stating:

> "In the present case, the Government chose to introduce, through Agent Cortina the hearsay declarations of the absent alleged coconspirator Fernandez. Then, on the foundation laid by these hearsay declarations, the Government introduced the AR-180 rifle (Government Exhibit No. 3). The defendants, of course, objected to all of this on the various grounds described above. It is elementary that the admissibility of the hearsay declarations, and therefore the AR-180, hinges on whether the declarations were made during the course of and in furtherance of the conspiracy charged, and thus

come within the well-recognized coconspirator excepton to the hearsay rule. . ."

As noted, the general rule regarding the admissibility of post-arrest statements precludes their use as evidence, viz—

Wharton's Criminal Evidence, Section 643, page 332, where the following is stated:

"Section 643. After conspiracy ended. It is well established that a declaration of a conspirator made in the absence or without the knowledge of the accused, after the conspiracy has come to an end through withdrawal or arrest of the participants or termination of the plan in success or failure, is inadmissible to prove the guilt of one other than the declarant."

Aside from the fact that in the case sub judice *no* cautionary instruction was ever provided by the Court to limit the Jury's consideration of the statements made to only the declarant thereof, such treatise goes on to reflect that even such an instruction is and/or may be insufficient to cure the damage resultant from such statements, i.e.

"Although it had been recognized that a post-conspiracy declaration could be received in evidence, notwithstanding possible prejudice to a nondeclarant, if the trial judge instructed the jury to regard the declaration as evidence only against the declarant, this is no longer permissible. The reality has been recognized

> that, despite the instruction to the contrary, there is a 'substantial risk' that the jury may be influenced by an inculpatory declaration in determining a nondeclarant's guilt, and hence the admission of such a declaration would violate a nondeclarant-accused's 'right of cross-examination secured by the Confrontation Clause of the Sixth Amendment' ".

B. The prejudicial error resulting from the trial court's admission into evidence of gleanings from the Vessel FORTY; the the gun located therein; the title and/or registration papers; the food stuff; maps (or is it charts); and all other evidentiary matter secured as a result of the search of such Vessel.

In considering the propriety vel non of such claimed error, Defendant Merritt is cognizant that this Honorable Court has already denied his previously brought Motion to Suppress the same evidence. Notwithstanding, however, the additional facts adduced at trial and the subsequent determination of the Court during trial proceedings necessarily mandate that the Court reconsider and otherwise revisit its denial of such motion.

In this regard, the testimony of Sgt. Griffin unequivocably demonstrated that after the Vessel FORTY was stopped on Lake Ponchartrain, it was directed to follow the Sheriff's patrol boat into Harbor Inn (Geohagen's) Marina, being thereupon "escorted" by the Sheriff's patrol boat and three armed deputies to such singular destination—at a time when *no* probable cause existed as to any proscribed activity.

Albeit, and in considering such evidence in relationship to the admissibility of post-arrest statements, this Court specifically determined that the events which occurred after the initial stop, i.e.—in being further required to proceed to the Marina and to remain in such area *constituted an arrest*. Needless to state, such finding is sufficient, under applicable law, to require the granting of Defendant Merritt's Motion to Suppress all evidence subsequently seized and obtained.

The principles of law in this regard are set forth in the Motion to Suppress filed in behalf of Cori and Arthur Des Roches as well as Defendant Merritt and which, by reference and for reasons of brevity, are incorporated herein.

As noted, the Fifth Circuit Court of Appeals has consistently upheld the use of factual matter adduced during trial proceedings in determining the propriety of a pre-trial denial of a Motion to Suppress. *United States v Quiroz-Carrasco*, (5th Cir 1978) 565 F2d 1328. *Rent v United States*, 209 F2d 893 (5th Cir. 1954)

Indeed, in *Rouse v United States*, (CCADC 1966) 359 F2d 1014, the Court of Appeals for the District of Columbia, determined it to be a *duty* on the part of the trial judge, to revisit a pre-trial denial of a Motion to Suppress, stating:

> "A pre-trial ruling on a motion to suppress does not bind the trial judge in all circumstances. New facts, new light on the credibility of government witnesses, or other matters appearing at trial may cast reasonable doubt on the pre-trial ruling. It then becomes the

duty of the trial judge to consider de novo the issue of suppression and, if necessary, hold a hearing out of the presence of the jury."

Albeit, and in accord with such clear expression of authority and jurisdiction, it is submitted that the Court should not only reconsider its earlier denial of Defendant Merritt's Motion to Suppress, but otherwise grant the same to the end that the inadmissibility of all evidence seized from the FORTY would compel a dismissal of all charges as against Defendant Merritt.

C. The prejudicial admission into evidence of an "expert" opinion which improperly served to identify tire markings found at the Roan Lane residence as being made from tire "bumpers" carried aboard the Vessel FORTY.

In considering such claimed error, the Court is reminded of the vigorous objections made by undersigned counsel during both the Voir Dire and direct testimony of the "expert" witness, Jim Churchman. Significantly, and without such "Expert" testimony, there could be no possible way to have related the Vessel FORTY to the Roan Lane residence. Ergo, the testimony of Mr. Churchman was critical to the Government's prosecution of the Defendant Merritt on *each* of the four Counts of the indictment. Yet, and as demonstrated in the record, such "expert" was in fact, no "expert" whatsoever, with respect to the subject matter of his testimony.

Albeit, this Defendant readily concedes that Mr. Churchman in his particular area is and/or may be regarded as an expert and his opinion and testimony as to such areas should appropriately be received in evidence.

HOWEVER, Mr. Churchman candidly admitted:

(1) That he had never previously been called upon to compare or otherwise identify tire markings with another surface. (2) That he had no prior experience with respect to such comparisons nor did he have any special qualifications to enable him to do so. (3) That although his services have been widely utilized to secure latent prints from crime scenes, he never was called upon to make fingerprint comparisons, nor did he ever testify in any proceeding concerning the same (4) That he was not familiar with any studies or publications concerning such tire comparisons.

Incredibly, therefore, and notwithstanding the complete absence of any expertise or qualifications in such specific non-scientific area(s), Mr. Churchman was nonetheless permitted to testify and express an opinion with respect to such critical facts. Indeed, the irreparable and prejudicial damage to Defendant Merritt from such "expert" testimony and opinion was further compounded in the face of the extensive testimony provided by the witness to establish his qualifications as a forensic expert in *other* areas.

In *United States v Brown*, (5th Cir. 1977) 557 F2d 541, the Fifth Circuit Court of Appeals reversed a conviction where the opinion of an "expert" on critical matters was deemed to be without scientific foundation or credible support, with the Court decisively holding, at 558, as follows

> "While it is a truism that every useful new development must have its first day in court, see United States v. Stifel, 433 F 2d at 438, expert testimony on a critical fact relating to

guilt or innocence is not admissible unless the principle upon which it is based has attained general acceptance in the scientific community and is not mere speculation or conjecture."

Needless to state, even the "expert" witness, Mr. Churchman, conceded that he knew of no studies or instances in which tire print comparisons with another surface had ever been made much less "accepted in the scientific community".

In so determining, the Court in *Brown*, astutely reasoned:

> "A courtroom is not a research laboratory. The fate of a defendant in a criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears an 'aura of special reliability and trustworthiness'. Although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has yet to gain general acceptance in its field. See e.g. United States v Amaral, 488 F 2d 1148, 1152 (9th Cir. 1973); Frye v United States, 293 F. at 1014. In recognition of the inherent danger that expert testimony admitted without proper foundation may tend to confuse or mislead the trier of fact and thus defeat a defendant's right to a fair trial, in United States v Green, 548 F.2d at 1168, we adopted the four criteria for reviewing a district court's decision to admit expert testimony set down in United States v Amaral, 488 F 2d at 1152. Four factors *must* appear in the record to uphold the admission of expert testimony: 1 qualified expert; 2. proper subject;

3. conformancy to a generally accepted explanatory theory; and 4. probative value compared to prejudicial effect. United States v Green, 548 F 2d at 1268, citing United States v Amaral, 488 F 2d at 1152."

It is submitted that none of such essential criteria were present in the case sub judice and the inherently and prejudicial testimony relating to the tires should not have been admitted.

Respectfully submitted.

LOUIS VERNELL, Esquire
420 Lincoln Road
Miami Beach, Florida 33139

and

WAYNE D. MANCUSO, Esquire
850 South Clearview Parkway
Suite 100
New Orleans, La.

By _____
Louis Vernell

Attorneys for Defendant Merritt

IT IS HEREBY CERTIFIED that a true copy of the foregoing Motion was hand-delivered to the Hon. Howat Peters, Assistant U.S. Attorney, and furnished to all counsel of record.

_____

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appendix was mailed to the Office of the Solicitor General, and the Office of the U.S. Attorney for the Eastern District of Louisiana, this April 16, 1986, and will be mailed to other counsel this date or on April 17, 1986.

Respectfully submitted,

Louis Vernell, Jr.
160 Sunny Isles Boulevard
North Miami Beach, Florida 33160
(305) 949-6151

and

Law Offices James G. Roth
420 Lincoln Road — Suite #329
Miami Beach, Florida 33139
(305) 538-0001

Attorneys for Petitioners
Messrs. Murphy and Hartsel

By /s/ James G. Roth
James G. Roth